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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6219

THOMAS BALDASAR, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Mary Robinson, Deputy Defender
Michael Mulder, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Attorneys for Petitioner

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IN THE

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NO. _____

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-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioner, Thomas Baldasar, prays that a Writ of Certiorari be issued to the Illinois Appellate Court, Second District for review of the judgment of that Court in this case. (Opinion Appendix A. 1).

A. OPINION BELOW

The opinion of the Illinois Appellate Court, with one judge dissenting, is reported at 52 Ill.App.3d 305, 367 N.E.2d 459 and is attached as Appendix A. The Illinois Supreme Court denied the timely Petition for Leave to Appeal in an unreported order, attached as Appendix B.

B. STATEMENT OF JURISDICTION

(i) The petition is timely filed within ninety days of the Illinois Supreme Court's November 23, 1977 order denying the Petition

for Leave to Appeal.

(ii) There has been no petition for rehearing or request for an extension of time within which to petition for certiorari.

(iii) Jurisdiction is conferred by Title 28 U.S. Code, §1257(3).

C. QUESTION PRESENTED FOR REVIEW

Whether The Sixth Amendment As Interpreted In Argersinger v. Hamlin, 407 U.S. 25 (1972), and Burgett v. Texas, 398 U.S. 109 (1967), Prohibits The Use Of A Prior Uncounselled Misdemeanor Conviction To Increase A Sentence Of Imprisonment Under An Enhanced Penalty Statute?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

Amendment XIV to the Constitution of the United States provides in pertinent part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The enhanced penalty provision found in Ill.Rev.Stat., 1973, Ch. 38, par. 16-1(e)(1), provides:

> (e) Sentence.
>
> (1) Theft of property, other than a firearm, not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft, including retail theft, other than theft of a firearm, is a Class 4 felony.

The sentencing provision for misdemeanors found in Ill.Rev.Stat., 1975, Ch. 38, §1005-8-3(a)(1), provides in pertinent part:

> (a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:
>
> (1) for a Class A misdemeanor, for any term less than one year ...

The sentencing provisions for felonies found in Ill.Rev.Stat., 1975, Ch. 38, §1005-8-1(b)(5), and (c)(5), provides in pertinent part:

> (b)(5) for a Class 4 felony, the maximum term shall be any term in excess of one year not exceeding three years.
>
> (c)(5) for a Class 4 felony, the minimum term shall be one year in all cases.

E. STATEMENT OF THE CASE

The instant case was tried in August, 1976 on an information charging petitioner with the offense of theft of one "Dial Massage" having a value less than $150. The information also alleged that this was the defendant's second conviction for theft, thereby allowing the offense to be prosecuted as a felony rather than a misdemeanor under the enhanced penalty provisions of the Criminal Code. (Ill.Rev.Stat., 1973, Ch. 38, par. 16-1(e)(1).)

At trial the State introduced evidence of petitioner's earlier May, 1975 misdemeanor theft conviction for which he received a one year term of probation and a $150 fine. The record is clear that petitioner was not represented by counsel at the prior proceedings. (R. 55). Because of this deficiency defense counsel objected to the introduction of the uncounselled theft conviction for purposes of raising the instant offense to a felony. (R. 50-54). The trial court overruled the objection, used the counselless conviction to enhance the penalty, and sentenced petitioner to one to three years in the penitentiary. Thus, rather than face a sentence of up to 364 days (which is the maximum sentence permitted for a misdemeanor Ill.Rev.Stat., 1975, Ch. 38, §1005-8-3(a)(1)), the petitioner was sentenced to the maximum term for a Class 4 felony. (Ill.Rev.Stat., 1975, Ch. 38, §1005-8-1(b)(5) and (c)(5)). Therefore, two years of (potential) extra imprisonment were imposed as the direct result of the earlier conviction.

F. STAGE AT WHICH FEDERAL QUESTION WAS RAISED

As noted above, petitioner first raised his Sixth and Fourteenth Amendment claims in the trial court by objection to the use of the conviction obtained without counsel. (R. 50-54). By presenting this claim to the Appellate Court and to the Illinois Supreme Court in his Petition for Leave to Appeal, petitioner has pursued his constitutional claim at every stage of the proceedings.

G. REASONS FOR ALLOWANCE OF THE WRIT

THE ILLINOIS COURTS, BY PERMITTING THE USE OF INHERENTLY UNRELIABLE COUNSELLESS MISDEMEANOR CONVICTIONS TO ENHANCE SENTENCES OF IMPRISONMENT, HAVE DECIDED A SUBSTANTIAL FEDERAL QUESTION IN A MANNER WHICH CONFLICTS WITH THIS COURT'S DECISIONS ON THE RIGHT TO AND NEED FOR COUNSEL.

a.

Convictions Obtained Without Counsel's Presence Are Inherently Unreliable And For That Reason This Court Should Prohibit Their Use For Enhancement Purposes.

The requirement of counsel goes to the very integrity of the fact finding process in criminal trials. A conviction obtained after a trial in which the defendant is denied the assistance of a lawyer lacks reliability. Loper v. Beto, 405 U.S. 473, 484, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). To assure reliability by providing a fair trial was the very rationale of Argersinger v. Hamlin, 407 U.S. 25, 42 S.Ct. 2006, 32 L.Ed.2d 530 (1972), which holds that no imprisonment may be imposed unless the accused is represented by counsel. This court reasoned that the guiding hand of counsel was necessary at every step of the proceeding. Without it, even though one was not guilty, he faced the danger of conviction because he did not know how to establish his innocence. 407 U.S. 25, 31. Here the trial and appellate court's decision erode that fundamental principle of law by allowing unreliable convictions to be used to enhance penalties.

This Court will not permit the use of an uncounselled felony conviction to "support guilt or enhance punishment for another offense ..." Burgett v. Texas, 398 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Defendant Burgett was imprisoned for his prior uncounselled conviction, while the present petitioner was not. This fact, however, should not serve to distinguish the two cases for the additional fact of imprisonment in Burgett adds nothing to the reliability of the conviction. Both convictions are unreliable because of counsel's absence and it is that fact that should control. Certiorari was recently denied in a case where the Fifth Circuit held the mere fact that punishment was not imposed does not cure the conviction's unreliability:

> By dint of the serious problems associated with the prosecution of misdemeanors, the great concern in Argersinger was with the salutary contributions to be made through the presence

> of a lawyer in the courtroom representing the interests of the accused 407 U.S. at 36-37, 92 S.Ct. at 2012, 32 L.Ed.2d at 537-538. The issues that arise in misdemeanor prosecutions are often complex and beyond the usual competence of the accused. Whether a sentence of imprisonment is or is not ultimately imposed has little bearing on the complexity of those issues or the ability of the accused to defend himself in the circumstances.

Potts v. Estelle, 529 F.2d 450, 454 (5th Cir., 1976), cert. denied 22 Cr.L. 4113 (No. 77-503, Dec. 12, 1977).

Without the use of the prior conviction petitioner could only have received a sentence of less than one year. (Ill.Rev.Stat., 1973, Ch. 38, par. 16-1(3)(1).) The dissenting Appellate Court Justice's opinion takes into account the extra two years imprisonment petitioner received and summarizes the conclusion mandated by the constitution:

> ... Argersinger should be applied to invalidate prior convictions where "the direct or collateral consequences from uncounseled misdemeanor convictions relate to loss of liberty or imprisonment" ... Here, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence. On this basis, it seems to me that the instant case falls within Argersinger and should be reversed and remanded for re-sentencing as a misdemeanor. (citation omitted)(emphasis original).

People v. Baldasar, 367 N.E.2d 459, 466 (2nd Dist., 1977) (Rechenmacher, P.J., dissenting). The findings of the majority are contrary to the spirit and letter of Argersinger and Burgett and should be reviewed.

b.

Resolution Of The Issue Presented Is Necessary Because The Constitution Is Being Interpreted Differently By Various Courts Resulting In Some Individuals Being Deprived Of Their Liberty For Much Greater Periods Than Others In Identical Circumstances.

A majority of the courts addressing the issue presented here or the analagous issue of whether one can be impeached by use of an uncounselled conviction have found such uses of prior counselless convictions to be unconstitutional. State v. Franklin, 337 So.2d 1152 (La.S.Ct. 1976); State v. Strange, 308 So.2d 795 (La.S.Ct. 1975); Alexander v. State, 258 Ark. 633, 527 S.W.2d 927 (1975); Maghe v. State, 507 P.2d 950 (Okla.Crim.App., 1973); State v. Kirby, 33 Ohio Misc. 48, 289 N.E.2d 406 (1972); Commonwealth v. Barrett, 322 N.E.2d 89 (Mass.App., 1975); State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968); and Potts v. Estelle, 529 F.2d 450 (5th Cir., 1976).

The Illinois Appellate Court followed two courts that reached the

opposite conclusion. Aldrighetti v. State, 507 S.W.2d 770 (Tex.Cr.App., 1974); and State v. McGrew, 127 N.J. Super 226, 317 A.2d 390 (1974). Aldrighetti, however, like the instant case was decided by a divided panel. 507 S.W.2d 770, 773-75 (Onion, P.J., dissenting). The divergent opinion on the constitutional question presented here make this case ripe for this Court's resolution. This is especially true since petitioner received two years extra imprisonment for conduct that could not be constitutionally used to enhance his punishment in other jurisdictions.

H. CONCLUSION

For the compelling reasons stated above, petitioner requests that a writ of certiorari be allowed to resolve the substantial federal question presented.

Respectfully submitted,

Mary Robinson, Deputy Defender
Michael Mulder, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

THE OPINION OF THE APPELLATE COURT OF ILLINOIS IN PEOPLE B. BALDASAR CAN BE FOUND AT PAGE 19 OF THE APPENDIX VOLUME.

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OCTOBER TERM, 1977

NO. 77-6219

THOMAS BALDASAR, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

(ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT)

SUPPLEMENTAL BRIEF FOR PETITIONER

Mary Robinson, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Michael Mulder, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
130 North Wells, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6219

THOMAS BALDASAR, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

(ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT)

SUPPLEMENTAL BRIEF FOR PETITIONER

On March 5, 1979, this Court in Scott v. Illinois, ___ U.S. ___, 39 C.C.H. S.Ct. Bull. B1339, 1344 (1979), adopted "actual imprisonment as the line defining the constitutional right to appointment of counsel". In doing so, the Court in a five to four decision rejected the contention that the State's were constitutionally required to provide counsel whenever imprisonment is an authorized penalty. Having answered this question petitioner asks that certiorari be granted in his case to resolve the remaining issue of whether the Sixth Amendment as interpreted in Argersinger v. Hamlin, 407 U.S. 25 (1972), and Burgett v. Texas, 398 U.S. 109 (1967), prohibits the use of a prior uncounseled misdemeanor conviction to increase a sentence of imprisonment under an enhanced penalty statute.[1]

Having approved uncounseled convictions where only a fine is imposed, this Court should provide guidance to the many jurisdictions on the question of their collateral consequences. Both the concurring opinion in Scott v. Illinois, of Mr. Justice Powell 39 C.C.H. S.Ct. Bull. at B1346, and the dissenting opinion of Mr. Justice Brennan, 39 C.C.H. S.Ct. Bull. at B1354, n. 13, note that the collateral consequences of these convictions remain an unsettled area of law. See also Note, Argersinger v. Hamlin and Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial, 35 Ohio St. L. J. 168 (1974). In petitioner's case the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence.

Petitioner urges this Court to accept certiorari in his case. There, of course, would be no inconsistency with the holding of Scott v. Illinois, were this Court to allow counselless misdemeanor convictions where no imprisonment was imposed, while at the same time prohibiting their use for enhancement purposes.

Respectfully submitted,

Mary Robinson, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Michael Mulder, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
130 North Wells, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

---

1. A substantial number of jurisdictions are in conflict on the issue. Those finding the use of uncounseled convictions for enhancement or impeachment purposes unconstitutional include: State v. Franklin, 337 So.2d 1152 (La.S.Ct. 1976); State v. Strange, 308 So.2d 795 (La.S.Ct. 1975); Alexander v. State, 258 Ark. 633, 527 S.W.2d 927 (1975); Maghe v. State, 507 P.2d 950 (Okla.Crim.App., 1973); State v. Kirby, 33 Ohio Misc. 48, 289 N.E.2d 406 (1972); Commonwealth v. Barrett, 322 N.E.2d 89 (Mass.App., 1975); State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968); and Potts v. Estelle, 529 F.2d 450 (5th Cir., 1976).

Those reaching the opposite conclusion including the Illinois Appellate Court in this case are: Aldrighetti v. State, 507 S.W.2d 770 (Tex.Cr.App., 1974); and State v. McGrew, 127 N.J. Super 226, 317 A.2d 390 (1974).

Supreme Court, U. S.
FILED
MAY 24 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6219

THOMAS BALDASAR,

Petitioner,

—*v.*—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1978
CERTIORARI GRANTED MARCH 19, 1979

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6219

THOMAS BALDASAR,

Petitioner,

—*v.*—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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CHRONOLOGICAL LIST OF RELEVANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD, AND ORDERS ENTERED

December 23, 1975—Information filed.

January 14, 1976—Arraignment.

July 26, 1976—Jury trial commenced.

July 27, 1976—Jury returned guilty verdict.

August 16, 1976—Sentencing hearing held; Petitioner Baldasar sentenced to a one to three year term of imprisonment.

September 8, 1976—Notice of appeal filed.

August 30, 1977—Opinion of the Appellate Court of Illinois, Second Judicial District.

November 23, 1977—Petition for Leave to Appeal denied by the Supreme Court of Illinois.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs.*—

THOMAS O. BALDASAR, DEFENDANT

No. 75-5637-G

INFORMATION

Filed December 23, 1975

JOHN J. BOWMAN, State's Attorney in and for the County of DuPage, State of Illinois, by J. MICHAEL JAMES, Assistant State's Attorney, now appears before the Circuit Court of the 18th Judicial Circuit, and in the name and by the authority of the PEOPLE OF THE STATE OF ILLINOIS, states that THOMAS O. BALDASAR, did on the 13th day of November, 1975, at and within DuPage County, Illinois, commit the offense of THEFT in that he did knowingly exert unauthorized control over property of Montgomery Ward and Co., Inc., being one Dial Massage, having a total value of less than $150.00, intending to deprive Montgomery Ward and Co., Inc., permanently of the use and benefit of said property. That said defendant was previously convicted of theft on May 1, 1975, in violation of Illinois Revised Statutes 1974, Chapter 38, Section 16-1(a)(1), and AGAINST THE PEACE AND DIGNITY OF THE SAME PEOPLE OF THE STATE OF ILLINOIS.

JOHN J. BOWMAN
State's Attorney

BY: /s/ J. Michael James
Assistant State's Attorney
(Jurat omitted in printing)

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs.*—

THOMAS O. BALDASAR, DEFENDANT

No. 76-5637-G

MOTION

Filed July 27, 1976

The defendant, THOMAS O. BALDASAR, moves that the Certified Copy of Conviction of a Thomas Baldasar dated 5/1/75 not be admitted into evidence for the following reasons:

1. The name of the two defendants are not identical. *People* v. *Connell*, 286 N.E. 2d 565 (1972) states that a "certified copy of alleged prior conviction for theft on which name similar to defendant's was not proof beyond a reasonable doubt of prior conviction for purposes of imposing felony theft."
2. There has been no affirmative showing that the defendant was represented by counsel. *People* v. *Dixon*, 46 Ill. 2d 496, 263 N.E. 2d 876, 878 (1970). *People* v. *Thompson*, 48 Ill. 2d 41, 268 N.E. 2d 369, 371 (1971).

Respectfully submitted,

FRANK WESOLOWSKI, JR.
DuPage County Public Defender

BY: /s/ Carol Anfinson
Deputy Public Defender

IN THE CIRCUIT COURT OF DUPAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
OF ILLINOIS

TRIAL TRANSCRIPT AND PROCEEDINGS
CONDUCTED JULY 27, 1976

PRESENT:
FOR THE PEOPLE OF THE STATE OF ILLINOIS:
JOHN J. BOWMAN
State's Attorney, By
Andres J. Eglitis
Assistant State's Attorney

FOR THE DEFENDANT:
CAROL ANFINSON
Assistant Public Defender

TESTIMONY OF SOL VALIERY
DIRECT EXAMINATION
BY: MR. EGLITIS

[R. 46] Q. Mr. Valiery, would you state your name, please, and spell your last name for the Court record?
A. Sol Valiery, V-a-l-i-e-r-y.
Q. What is your occupation, sir?
A. Perishable manager, Jewel Food Stores.
Q. Where are you presently employed?
A. 5534 Cermak in Cicero.
Q. Mr.—is it Valiery?
A. Right.
Q. Mr. Valiery, calling your attention to April 8th, 1975, where were you employed on that date?
A. 2001 West Roosevelt Road, Broadview, Illinois.
Q. What sort of an establishment were you employed in at that time?
A. A Jewel Food Store, as store manager.
Q. You were the store manager?
A. Right.

Q. I call your attention to April 8th, 1975. Do you recall anything unusual happening in that store on that date?
A. Yes. Mr. Baldasar was in my store.
I apprehended him after observing him put [R. 47] three pounds of bacon under his pants.
MS. ANFINSON: Objection. This is really irrelevant.
THE COURT: That may be stricken, as to what he saw.

BY MR. EGLITIS:

Q. Mr. Valiery, calling your attention, if I may to May 1st, 1975, do you recall that day?
A. Yes, I do.
Q. Where were you on that day?
A. In the Oak Park Village Hall court room.
Q. Why were you there at that particular time?
A. Testifying against Mr. Baldasar in court.
Q. Do you see that person in court today?
A. Yes, I do.
Q. Would you point him out to the Court, please, and tell the Court where he is sitting and what he is wearing, for the Court record?
A. He is sitting directly in front of me wearing a red shirt.
Q. Is that the same person who you observed in your store on April 8th, 1975?
MS. ANFINSON: Again objection, Judge.
That is irrelevant.
THE COURT: Sustained.

BY MR. EGLITIS:

[R. 48] Q. Mr. Valiery, is the person you have just identified the same person whom you observed in court on May 1st, 1975?
A. Yes, he is.
Q. What was Mr. Baldasar doing in that court room on that date, if you know?
A. He was appearing on charges of shop lifting.
Q. Did you testify in that case?
A. Yes, I did.

Q. At that time, Mr. Valiery, did you identify Mr. Baldasar?

A. Yes, I did.

Q. It that the same person who is in the court room now, that you identified on May 1st of 1975?

A. Yes, it is.

Q. You testified at the trial. Is that correct?

A. Yes, I did.

Q. Did you hear—strike that

Was that a bench trial or a jury trial?

A. A bench trial.

Q. Do you recall what if any decision the judge made in that particular case in May 1st, 1975, in Oak Park?

A. Guilty, and fined $159.

MR. EGLITIS: Mr. Reporter, would you please mark this [R. 49] People's Exhibit No. 3 for identification.

(The document was thereupon marked People's Exhibit No. 3 for identification.)

BY MR. EGLITIS:

Q. Mr. Valiery, I show you what has been marked People's Exhibit No. 3 for identification. Would you examine that document, please, and tell the Court if you recognize it and if you do recognize it what is it?

A. Yes, I recognize it.

Q. What do you recognize that to be?

A. This is the statement of the—

MR. ANFINSON: Judge, if he is looking at a Court record, I would say he is incompetent to testify what that Court record is.

THE COURT: Sustained.

MR. ANFINSON: I don't know what he is looking at.

BY MR. EGLITIS:

Q. Did you sign a complaint in that case, Mr. Valiery?

A. Yes, I did.

Q. Do you recognize your signature any place on this document, People's Exhibit No. 3?

A. Yes. It is right here.

Q. That is your signature?

A. Yes, it is.

[R. 50] MR. EGLITIS: Have you seen this, Counsel?

MS. ANFINSON: Are you referring to the complaint?

MR. EGLITIS: To the whole thing.

MS. ANFINSON: Yes, I have.

MR. EGLITIS: Your Honor, I would seek at this time to introduce into evidence what has been marked People's Exhibit No. 3 for identification, purporting to be a certified copy of a half-sheet from the Court records of the Circuit Court of Cook County for the Municipal District of Oak Park, Illinois.

THE COURT: Is there any objection?

MS. ANFINSON: Yes, Judge.

I have a motion at this point.

THE COURT: All right.

(Whereupon the following further proceedings were had herein, in chambers, outside the presence and hearing of the jury, to-wit:)

MS. ANFINSON: Judge, first, you will notice on the complaint they have his name wrong.

Furthermore, there has been no affirmative showing that the defendant was represented by counsel, which is required by People versus Dixon and People versus Thompson, to be effective, under the Recidivist Statute.

It is the same sort of reasoning.

[R. 51] THE COURT: Do you have the Illinois citation?

MS. ANFINSON: Yes. People vs. Dixon, 46 Illinois 2nd, 502.

I am referring to the second paragraph, Judge.

As for the first paragraph, I didn't anticipate that they would have the person in court to testify.

The certified copy does not have exactly the same name on it.

But I am referring to the second paragraph.

THE COURT: In other words, you state that since he was not represented by counsel—

MS. ANFINSON: I state beyond that, there there is no affirmative showing that he was represented by counsel.

I know that the testimony will show that he wasn't represented by counsel, but at this time there is no affirmative showing that he was, as is required by those two cases.

Also the same sort of reasoning is found in Burgett vs. Texas, which is that under the Recidivist Statute you must show that in the original case he was represented by counsel.

THE COURT: I don't see anything in the headnotes in this case on that point.

MS. ANFINSON: Since I researched it myself, I am [R. 52] pretty sure I am right.

I will have to read it through. It has been a while.

The other one is probably the clearer case, on page 41, People vs. Thompson.

It talks about the affirmative showing—they actually don't discuss it, but they do talk about no affirmative showing in the conviction statement that the defendant was represented by counsel or waived counsel.

MR. EGLITIS: They don't decide the question.

MS. ANFINSON: They don't decide the question, but I cite this case because it does illustrate the point.

THE COURT: "A further claim is made that the conviction statement which forms the basis for the enhanced penalty failed to show that the defendant was represented by counsel at the time of the former conviction.

". . . . defendant contends that this defect renders the present conviction invalid. On the basis of the original record there would be merit to defendant's claim. However, a supplemental record has been filed showing that defendant was represented by counsel at the [R. 53] time of his prior conviction."

MS. ANFINSON: They cured that in that case by showing later that he was represented by counsel.

However, originally there was no affirmative showing, so in fact the Court said that that does have merit.

The reason it was cured was by the later showing after the trial that he did have counsel.

THE COURT: Of course, that was a felony case.

MS. ANFINSON: This is also a felony charge.

The original case was not. That is true.

The original case was a misdemeanor.

THE COURT: On that basis I don't think the Supreme Court case applies.

MS. ANFINSON: However, it was a Class A misdemeanor, which does carry a possible penalty of a year in jail.

THE COURT: That is right, but it is not a felony.

On the basis of it not being a felony, I will deny your motion.

MR. EGLITIS: Your Honor, again at this time I move to admit the exhibit into evidence.

The Circuit Court of Cook County has attached to the certified copy of the half-sheet a copy of the complaint.

[R. 54] If Counsel has no objection to the copy of the complaint which states the facts of the first theft, I would be willing to agree to remove that and just enter the half-sheet, if the Court feels it is prejudicial.

MS. ANFINSON: I would just as soon leave it on.

MR. EGLITIS: Fine. I will leave it on.

THE COURT: Okay. That settles that.

MS. ANFINSON: I have a certified copy of that complaint.

THE COURT: All right. Now, this will be filed. Is that correct?

MS. ANFINSON: Yes.

(Whereupon the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

MR. EGLITIS: May I proceed, your Honor?

THE COURT: Yes. Let the record show that People's Exhibit No. 3 will be admitted.

(The document was thereupon received in evidence, marked People's Exhibit No. 3.)

MR. EGLITIS: Thank you, your Honor.
The State has nothing further from this witness.
Thank you, Mr. Valiery.
[R. 55] THE COURT: Just a moment, sir.
You may cross examine.

CROSS EXAMINATION

BY MS. ANFINSON:

Q. You were present in the Oak Park Village court hours when Mr. Baldasar was convicted. Is that correct?
A. Yes.
Q. Was he represented by counsel at that time?
A. No, he wasn't.
Q. What was the theft that he was convicted of?
A. Three pounds of bacon.
Q. Is that the same as three packages of bacon?
A. Yes.
MS. ANFINSON: I have no further questions.
MR. EGLITIS: I have nothing further, your Honor.
THE COURT: You may step down.

(Witness excused.)

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs.*—

THOMAS O. BALDASAR, DEFENDANT

No. 75-5637-G

PEOPLE'S EXHIBIT NUMBER 3

[Stationary Seal and caption omitted in printing]

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINIOS
FOURTH MUNICIPAL DISTRICT

Case Number(s)

75 MC 4-51968

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THOMAS BALDASAR, DEFENDANT(S)

I, Morgan M. Finley, Clerk of the Court and Keeper of the records and files thereof in the Fourth Municipal District, Circuit Court of Cook County, Illinois, do hereby certify the attached is a true, perfect, and complete copy of a certain Memorandum commonly called a Half-Sheet and Order, the original of which is now in my possession.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Court at Oak Park, Illinois, this 13th day of January, A.D. 1976.

,'s/ MORGAN M. FINLEY

[SEAL]

655 Lake Street
Oak Park, Illinois 60301
(848-9830)

405
(Court Branch)

05-01-75
(Court Date)

CLERK OF THE CIRCUIT COURT OF
COOK COUNTY MISDEMEANOR

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

COMPLAINT

No. ———

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

THOMAS M. BALDASAR, DEFENDANT

Sol E. Valiery (For Jewel Tea Co,) complaint, now appears before The Circuit Court of Cook County and states that

Thomas M. Baldasar has, on or about April 8, 1975 at 2001 Roosevelt Rd., Broadview committed the offense of Theft in that he did knowingly exert unauthorized control over property of the Jewel Tea Co., being three packages of bacon, having a total value of less than $50.00, with the intent to deprive said Jewel Tea Co. permanently of the use and benefit of said property.

in violation of Chapter 38 Section 16-1a1

ILLINOIS REVISED STATUTES

/s/ Sol Valiery
SOL E. VALIERY
2001 Roosevelt Rd.
Broadview 865-9206

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Sol Valiery

Subscribed and sworn to before me 04-07-75, 19—.

/s/ Morgan M. Finley
by [illegible signature]

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same. Leave is given to file said complaint.

Summons issued, Judge

or Bail set at $1,000.00

Warrant Issued, Judge Rule of Court

or

Bail set at Judge

No. 75 MC 4-51968

THE PEOPLE OF THE STATE OF ILLINOIS

—*vs.*—

THOMAS BALDASAR

THEFT

violation 38 16-1-A-1

PAPERS FILED AND WRITS ISSUED

Date		
4-8-75		Information filed D 75 81609 $1000 10% 100
Date	Judge	Orders Entered
5-1-75	Cawley	Leave to file Complaint. Bail $ Court takes jurisdiction of defendant in court on complaint filed. /s/ PNG JW F/G /s/ 1 Year Probation /s/ $159.00 X 10 SOM 5-15-75
5-15-75	Cawley	/s/ Judgment Satisfied $159 X 10

[DuPage County Clerk's Certification of Exhibit to Appellate Court Omitted in Printing.]

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

IN THE EIGHTEENTH JUDICIAL CIRCUIT, DU PAGE COUNTY, WHEATON, ILLINOIS

STATE OF ILLINOIS)
) ss MITTIMUS FOR STATE
COUNTY OF DUPAGE) PENAL INSTITUTIONS

PLEAS, before the Eighteenth Judicial Circuit Court, held in the City of Wheaton on August 16, 1976.

PRESENT: The HONORABLE ALFRED E. WOODWARD Judge of the 18th Circuit Court

JOHN J. BOWMAN States Attorney of DuPage County

WAYNE S. SHIMP Sheriff of DuPage County

ATTEST: JOHN W. COCKRELL, Clerk of the Eighteenth Judicial Circuit Court

BE IT REMEMBERED that on said date the following among other proceedings, were had and entered of record in said Court:

Case No. 75-5637-G

Filed August 16, 1976

THE PEOPLE OF THE STATE OF ILLINOIS

—versus—

THOMAS O. BALDASAR, DEFENDANT

JUDGMENT AND SENTENCE

Now comes THE PEOPLE OF THE STATE OF ILLINOIS by JOHN J. BOWMAN, States Attorney of

DuPage County by ANDY EGLITIS Assistant States Attorney, and the defendant, in person and by counsel, CAROL ANFINSON and now neither the defendant nor defendant's counsel saying anything further why judgment of the Court should not now be pronounced against the defendant on the (*VERDICT*) of guilty heretofore entered to the charge of THEFT UNDER $150 CHAPTER 38 SECTION 16-1(A)(1) (FELONY—SECOND CONVICTION) as charged in the *information* or returned in this cause on December 23, 1975.

THEREFORE, IT IS ORDERED AND ADJUDGED by the Court that the said defendant is guilty of the crime of THEFT UNDER $150 (FELONY—SECOND CONVICTION)

The Court finds the age of the said defendant to be 28 years.

The Court having offered to hear evidence in aggravation and mitigation of the offense as to the moral character, life, family, occupation, and criminal record of the defendant, and the presentation of evidence having been heard by the Court. The defendant having nothing further to say, the Court sentences Defendant to imprisonment in a [X] STATE PENITENTIARY [ ] CORRECTIONAL INSTITUTION and fixes the term of imprisonment at NOT LESS THAN ONE (1) YEAR NOR MORE THAN THREE (3) YEARS

IT IS FURTHER ORDERED AND ADJUDGED that the defendant be taken from the bar of this Court to the common jail of DuPage County, and from there to be taken by the Sheriff of DuPage County to

[ ] VANDALIA CORRECTIONAL CENTER at Vandalia, Illinois

[X] DIAGNOSTIC CENTER, STATEVILLE PENITENTIARY, at Joliet Illinois and be delivered to the Department of Corrections, and said Department of Corrections is hereby commanded to confine the defendant

for the term above fixed, or until discharged by due process of law. IT IS FURTHER ORDERED that the said defendant pay the costs of these proceedings and a mittimus be issued and executed without delay.

[Jurat Omitted].

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

No. 76-535

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

—*vs.*—

THOMAS BALDASAR, DEFENDANT-APPELLANT

Appeal from the Circuit Court of
DuPage County, Illinois

Honorable Alfred E. Woodward, Presiding Judge

OPINION

FILED AUGUST 30, 1977

Mr. JUSTICE NASH delivered the opinion of the court:

Defendant, Thomas O. Baldasar, after trial by jury, was convicted of theft of property not exceeding $150 in value, as a second offense, a Class 4 felony (Ill. Rev. Stat. 1973, ch. 38, pars. 16-1(a)(1), 16-1(e)(1)) and was sentenced to a term of one to three years in the penitentiary.

The primary issue on this appeal is whether defendant's prior, uncounseled misdemeanor theft conviction could constitutionally be considered so as to elevate the present misdemeanor theft offense to a felony thereby increasing the possible penalty which might be imposed upon conviction. Defendant contends the holding of *Argersinger* v. *Hamlin* (1972), 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006, bars such consideration. We do not agree.

In May 1975 defendant was convicted after bench trial of a misdemeanor theft and was sentenced to a one-year term of probation and fined $159. There is evidence he was not represented by counsel in that trial and no evi-

dence that defendant waived his right to counsel at that time. The present case was tried in August 1976 on an information in which the first petty theft conviction was alleged and proved at trial in order to invoke the enhanced penalty provisions of the Criminal Code provided for such recidivist conduct. (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(e)(1).) As a consequence, after conviction, defendant was sentenced to the penitentiary for conduct for which the maximum penalty would have been a term of less than one year in a penal institution other than a penitentiary except for the enhanced penalty made possible by defendant's prior theft conviction.

In *Argersinger*, that defendant was convicted of a misdemeanor after a trial conducted without counsel, where he had not waived his right to counsel, and he was sentenced to a term of 90 days in jail. In voiding that conviction, the United States Supreme Court stated,

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (407 U.S. 25, 37, 32 L. Ed. 2d 530, 538, 92 S. Ct. 2006, 2012.)

Defendant contends that he has been imprisoned in the present case as a direct or collateral result of his prior uncounseled conviction, and the mandate of *Argersinger* has now been violated in that the earlier conviction was applied to enhance the penalty imposed for his subsequent theft conviction.

Defendant concedes that his earlier 1975 theft conviction was itself valid under *Argersinger*. While he was not represented by counsel in that trial, he also was not imprisoned after being convicted of that theft offense. The penalty then imposed for that offense of probation and a fine left that case in the category recognized but not passed upon by the court in *Argersinger* where it stated,

> "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538, 92 S. Ct. 2006, 2012.

In *Argersinger*, the court held that no person may be imprisoned for any offense, petty, felony or misdemeanor, unless he is represented by or has effectively waived his right to counsel at trial. It directed itself only to cases wherein an uncounseled defendant had been convicted of a criminal offense and was then sentenced to imprisonment for that offense and that conviction. There is no language in the opinion suggesting a prospective application or readjudication of a defendant's right to counsel should he be convicted in the future of the commission of another offense and be then subject to another sentence. The notion that repeat offenders are subject to enhanced penalties for their conduct is so basic to our criminal justice system that it could not have escaped the notice of the *Argersinger* court. Yet, it carefully limited its holding to a conviction and the sentence imposed for that conviction.

The limited scope of *Argersinger* is further expressed in its statement that,

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." (407 U.S. 25, 40, 32 L. Ed. 2d 530, 540, 92 S. Ct. 2006, 2014.)

The "run of misdemeanors" would, indeed, be affected if we were to accept defendant's argument that the *Argersinger* court intended by the phrase "end up" or any other language to have contemplated its application to the facts in the instant case. In addition to the second or subsequent offense sentencing provision in our theft statute, with which we are directly concerned here, there are at least 10 similar enhanced penalty statutes which could not then be applied against the repeat offender they are designed to affect even though his earlier con-

victions met the *Argersinger* requirements as in the instant case.[1]

While Illinois courts of review have previously considered applications of *Argersinger* in various contexts (*City of Danville* v. *Clark* (1976), 63 Ill. 2d 408, 348 N.E.2d 844, *cert. denied* (1976), 429 U.S. 899, 50 L. Ed. 2d 184, 97 S. Ct. 266; *People* v. *Morrissey* (1972), 52 Ill. 2d 418, 288 N.E.2d 397; *People* v. *Coleman* (1972), 52 Ill. 2d 470, 288 N.E.2d 396; *People* v. *Scott* (1976), 36 Ill. App. 3d 304, 343 N.E.2d 517; *People* v. *Kerner* (1975), 32 Ill. App. 3d 676, 336 N.E.2d 65; *People* v. *Schultz* (1974), 21 Ill. App. 3d 1086, 316 N.E.2d 183; *People* v. *Bailey* (1973), 12 Ill. App. 3d 779, 301 N.E.2d 481), none have decided the question we are presented in this case. Of those few states which have considered similar questions concerning the extension of *Argersinger*, five would tend to support defendant's position herein while two would reject it. The former include: *City of Monroe* v. *Fincher* (La. 1974), 305 So. 2d 108; *Alexander* v. *State* (1975), 258 Ark. 633, 527 S.W.2d 928; *Commonwealth* v. *Barrett* (Mass. App. 1975), 322 N.E.2d 89; *Maghe* v. *State* (Okla. Crim. App. 1973), 507 P.2d 950; and *State* v. *Kirby* (1972), 33 Ohio Misc. 48, 62 Ohio Op. 2d 25, 289 N.E.2d 406; and the latter are *Aldrighetti* v. *State* (Tex. Crim. App. 1974), 507 S.W.2d 770, and *State* v. *McGrew* (1974), 127 N.J. Super. 327, 317 A.2d 390 (1974). We find that the conclusion reached in *Aldrighetti*, as quoted below, correctly reflects the scope of *Argersinger*.

---

[1] This number includes the following statutes in which a misdemeanor offense is elevated to a felony upon a second or subsequent conviction as in the present case: Ill. Rev. Stat. 1975, ch. 38, par. 16-5(c) (theft from coin-operated machines), par. 16A-10 (retail theft), par. 22-53 (hypodermic syringes and needles act violations), par. 24-1(b) (unlawful use of weapons), par. 28-1(c) (gambling), par. 28-3 (keeping a gambling place), par. 37-1(b) (maintaining a public nuisance), par. 70-52(b) (inducements to sell or purchase real estate by reason of race, color or religion—prohibition of solicitation violations); ch. 56½, par. 704(c) (possession of cannabis), par. 1406(a), (b) (Controlled Substances Act, miscellaneous violations).

This court has considered similar issues in *People* v. *Placek* (1976), 43 Ill. App. 3d 818, 357 N.E.2d 660, and *People* v. *Heal* (1974), 20 Ill. App. 3d 965, 313 N.E.2d 670. In *Placek*, the defendant contended that the sentencing judge, before imposing a one to three year term in the penitentiary for a current felony offense improperly considered a presentence report violative of defendant's constitutional rights because it listed a prior, uncounseled "shoplifting" conviction for which he had been granted probation for one year. While stating that "[i]t is questionable whether *Argersinger* applies to a misdemeanor which does not, in fact, result in incarceration" (43 Ill. App. 3d 818, 821, 357 N.E.2d 660, 663), the court also acknowledged that a question remained as to the collateral consequences of the prior conviction on defendant's present conviction although he had not been earlier sentenced to imprisonment. This issue was not reached for decision in *Placek* as the matter was resolved on other grounds.

In *Heal*, the defendant contended the sentencing judge improperly considered evidence of his prior traffic convictions in assessing a fine against him for a current traffic conviction in the absence of a showing that he had been represented by counsel at such previous convictions. The court reviewed *Argersinger* and subsequent decisions of our supreme court in *People* v. *Morrissey* (1972), 52 Ill. 2d 418, 288 N.E.2d 397, and *People* v. *Coleman* (1972), 52 Ill. 2d 470, 288 N.E.2d 396, and concluded,

> "It is apparent, therefore, that *Argersinger* is oriented toward cases resulting in a jail or prison sentence and the doctrine of that case should have no application *where no confinement was imposed.* We do not believe it was ever intended to be extended to a traffic case where no incarceration, but only a fine, had been imposed.
>
> Dealing with this point, the Texas Court of Criminal Appeals, in an opinion delivered March 27, 1974, held as follows:
>
> '[P]rior final convictions which are otherwise admissible may be used for the purpose of im-

> peachment or enhancement of punishment even though obtained while the defendant was not represented by counsel and had not waived counsel, so long as the punishment assessed in the prior convictions did not include imprisonment.' *Aldrighetti* v. *State*, 507 S.W.2d 770 at 772.
>
> It is our opinion, therefore, that misdemeanors generally, where no sentence of confinement is imposed, are outside the contemplation of *Argersinger*." *People* v. *Heal* (1974), 20 Ill. App. 3d 965, 968, 313 N.E.2d 670, 672.

While we recognize that *Heal* is factually distinguishable from the present case because the defendant therein was not imprisoned and because his uncounseled prior conviction was applied to a sentencing issue only and not for consideration as an element of a second offense prosecution as in this case, still we find the logic of the court's statements persuasive. They reflect our view that the *Argersinger* prohibition of imprisonment for any offense after an uncounseled conviction was limited in application to a single case in which a defendant was convicted and was not intended to limit the use of a properly obtained, although uncounseled, conviction in future proceedings based upon subsequent conduct of a defendant. We believe this to be true whether such use of the conviction is sought to be made for purposes of impeachment, sentence determination or, as in the instant case, to establish an element of a second or subsequent offense prosecution for which an enhanced penalty might be imposed.

We do not accept defendant's contention that use of his prior, uncounseled theft conviction results either directly or collaterally in imprisonment for that offense. The fact is that he was sentenced to imprisonment for his second theft conviction only and not, as he suggests, sentenced again, and this time to imprisonment, for the first theft conviction. A similar argument to that advanced by defendant was urged in cases arising under the former Habitual Criminal Act (repealed effective January 1, 1964, by Ill. Rev. Stat. 1965, ch. 38, par.

126-1) whereby repeated criminal offenses by a defendant made him subject to enhanced penalties. Our supreme court held that where more severe punishment was imposed under the Act due to prior convictions the punishment was for the new crime only. (*People* v. *Kirkrand* (1947), 397 Ill. 588, 74 N.E.2d 813.) That logic should apply here.

We are further persuaded that should we go beyond the dictates of *Argersinger* and extend its principle to apply in this case there would be little rational reason then why it would not also apply to prohibit enhancement or aggravation of a sentence in such cases where, as in *Heal*, a sentencing judge necessarily considered past criminal conduct of a defendant, or to the use of a lawful, prior uncounseled conviction for purposes of the impeachment of defendant. The United States Supreme Court has not yet determined that the Sixth Amendment requires such extension and we will not do so here.

The defendant also contends the jury was improperly instructed, thus requiring that the felony theft sentence imposed upon him be vacated and the cause remanded for resentencing as a misdemeanor.

The State introduced evidence of both the prior theft conviction we earlier discussed, which was alleged in the information, and also, after defendant testified, introduced a certified copy of defendant's prior armed robbery conviction for purposes of impeachment. The jury was correctly instructed on the elements of the offense of second offense theft, as charged, one element therein being that defendant had previously been convicted of the offense of theft. The jury was also correctly instructed by Illinois Pattern Jury Instructions, Criminal, No. 3.13, that "[e]vidence of the defendant's previous conviction of a crime is to be considered by you only insofar as it may affect his credibility as a witness, and must not be considered by you as evidence of his guilt of the crime with which he is charged." No other instruction relating to the evidence of prior convictions were submitted to the jury.

He argues that if the jury followed the court's instruction contained in IPI Criminal No. 3.13 it could not have considered the former theft conviction (as well as the armed robbery conviction) as evidence of his guilt and, therefore, could not have found a necessary element of the offense charged, *i.e.*, defendant's prior theft conviction, leaving only the current misdemeanor theft alleged in the information to support the verdict of the jury.

We find that defendant has waived any claim of error in the jury instructions by not objecting at the conference on instructions and by failing to raise the issue in his post trial motion. *People* v. *Ahlberg* (1973), 13 Ill. App. 3d 1038, 301 N.E.2d 608; *People* v. *Clark* (1976), 42 Ill. App. 3d 472, 355 N.E.2d 619.

In any event these is no merit to this claim as any error in this regard was, at most, harmless. Evidence of two prior convictions of defendant was introduced at trial, each for a different and limited purpose. A limiting instruction applicable to the armed robbery conviction, introduced for impeachment purposes, was properly given. While we believe a similar limiting instruction designed to clearly differentiate between impeachment and proof of an element of the offense charged should have been given, defendant failed to offer such a limiting instruction to the trial court and will not be allowed to assert on appeal that the jury was not properly instructed. *People* v. *Willis* (1976), 43 Ill. App. 3d 535, 357 N.E.2d 576; *People* v. *Walls* (1965), 33 Ill. 2d 394, 211 N.E.2d 699.

People v. *Edwards* (1976), 63 Ill. 2d 134, 345 N.E. 2d 496, relied upon by defendant, is not applicable to the present case. There a defendant was being tried on an indictment containing separate counts alleging both misdemeanor and felony offenses of unlawful use of weapons. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(2), (b).) An element of the felony count was that defendant had been convicted of a felony or released from the penitentiary within the past five years. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(b).) A prior felony conviction of that defendant was introduced in evidence both to establish the necessary element of the felony count being tried and for

purposes of impeachment after he testified. As in the present case, the jury was instructed to consider evidence of prior convictions for impeachment purposes only. The trial court, however, only instructed that jury as to the elements of the misdemeanor count charged and failed to instruct as to the felony count. Clearly, it was error for the trial court to then enter judgment against defendant on the felony count after the jury returned only a general verdict finding defendant guilty of unlawful use of weapons which did not specify whether it was under the felony or misdemeanor count.

No similar confusion exists in the present case and there is no uncertainty as to the determination of the jury. We believe the jurors, in context, understood that the limiting instruction pertaining to impeachment did not prevent them from properly considering the prior theft conviction as evidence of an element of the present offense. Obviously, if they had not done so they would not have returned the guilty verdict as they did.

For the reasons stated herein the judgment of the trial court will be affirmed.

Affirmed.

BOYLE, J., concurs.

Mr. PRESIDING JUSTICE RECHENMACHER, dissenting:

I respectfully dissent. I recognize that the *Argersinger* court directed itself only to cases wherein an uncounseled defendant had been convicted of a criminal offense and was then sentenced to imprisonment for that offense and that conviction. I further recognize that in the instant case the 1975 theft conviction itself was valid under *Argersinger* because, while the defendant was not represented by counsel at trial, he also was not imprisoned following his conviction. However, I do not agree with the majority when they say the *Argersinger* court "carefully limited its holding to a conviction and the sentence imposed for that conviction."

I would analyze the broad "*Argersinger* problem" by breaking *Argersinger*-type cases down into four classifications:

(1) Uncounseled misdemeanor convictions; under *Argersinger* no jail sentence can be imposed unless defendant has counsel, or knowingly waives counsel.

(2) Cases like the instant case, where a defendant is subject to much more severe penalties in a subsequent case because of an earlier, uncounseled misdemeanor conviction. Imprisonment in such cases would be increased as a direct consequence of the earlier, uncounseled conviction.

(3) Cases similar to *People* v. *Heal* (1974), 20 Ill. App. 3d 965, wherein the court considers prior, uncounseled convictions that are contained in a presentence report. Although *Heal* did not really involve the *Argersinger* problem (since no jail sentence was imposed), the court's citation of *Aldrighetti* v. *State* (Tex. Crim. App. 1974), 507 S.W.2d 770, in the context of the use of the pre-sentence report, implies that prior, uncounseled misdemeanor convictions can be considered by the court in imposing sentence. Certainly this is the view of *Heal* which both the State and the majority take.

(4) Cases like *Aldrighetti* v. *State* wherein the court approved the introduction of an earlier, uncounseled conviction for impeachment purposes. As noted, *Aldrighetti* was cited with approval in *Heal*.

Each one of the last three classes of cases present wholly different policy considerations, and a holding on a point (in one type of case) is thus distinguishable from a holding on a point involving one of the other types of cases. Thus, for example, in the instant case, proof of the prior, uncounseled conviction is an element of the State's case in chief and can only be proven through competent evidence, whereas for policy reasons, hearsay can be introduced in presentence reports or at a sentencing hearing, such as was at issue in *Heal*. Therefore, assuming the court approved the use of uncounseled convictions for impeachment and sentencing in *Heal*, in view of the different policy considerations that arise when the prior conviction is an element of the case in chief, *Heal* is no authority for the introduction of the earlier conviction in this case.

Further, in the instant case, two years of (potential) extra imprisonment are the direct result of the earlier conviction. In the *Aldrighetti* case, where the misdemeanor was introduced for impeachment purposes, the link between the prior conviction and the defendant's imprisonment was quite remote, or even speculative; it was impossible to state that, "but for" the earlier conviction, the defendant would not have gone to jail, or would have received a lesser sentence. The same can be said in the *Heal* context, though to a lesser extent, since sentencing involves the court's discretion, and prior convictions are but one factor in the exercise of that discretion. Clearly, in the instant case, imprisonment is a far more direct consequence of the use of the earlier conviction than would be the case in cases involving either impeachment or presentence reports.

In my opinion, it follows from these distinctions that a holding in this case, precluding the introduction of an uncounseled conviction as an element of the State's case in chief, leading directly to enhanced punishment, would not preclude the introduction of such convictions for impeachment, or in presentence reports. Thus, the holding here would only arise in convictions where the statute

provides for an enhanced penalty upon a second conviction.

Turning to the primary question of whether uncounseled convictions can be used in this specific class of cases, it is my thought that the question should be answered in the negative. This court, and others, has held that *Argersinger* should be applied to invalidate prior convictions where "*the direct or collateral consequences* from uncounseled misdemeanor convictions relate to loss of liberty or imprisonment." (Emphasis added.) (*People* v. *Placek* (1976), 43 Ill. App. 3d 818, 821.) Here, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence. On this basis, it seems to me that the instant case falls within *Argersinger* and should be reversed and remanded for resentencing as a misdemeanor.

NOTIFICATION OF DENIAL OF PETITION FOR LEAVE TO APPEAL BY SUPREME COURT OF ILLINOIS

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

November 23, 1977

State Appellate Defender
Second Judicial District
63 Douglas Street
Elgin, Illinois 60120

No. 50059—People State of Illinois, respondent, vs. Thomas Baldasar, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 77-6219

THOMAS BALDASAR, PETITIONER

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO the Appellate Court, Second District Court of the State of Illinois.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 19, 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294396 406

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

RECEIVED
MAY 30 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 77-6219

THOMAS BALDASAR,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ORIGINAL COPY

On Petition For A Writ Of Certiorari
To The Appellate Court of Illinois,
Second Judicial District.

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM J. SCOTT
Attorney General
State of Illinois,

DONALD B. MACKAY,

MELBOURNE A. NOEL, JR.,

KENNETH A. GRNACEK,
Assistant Attorneys General
188 W. Randolph St., Suite 22
Chicago, Illinois 60601

Attorneys for Respondents.

SANDRA L. ARENDT
Assistant Attorney General

Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-6219

THOMAS BALDASAR,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari
To The Appellate Court of Illinois,
Second Judicial District.

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Whether the use of a counseless misdemeanor conviction, obtained by a plea of guilty, to enhance a sentence, conflicts with this Court's decisions on the right to and need for counsel.

REASON FOR DENYING THE WRIT OF CERTIORARI

THE USE OF A COUNSELESS MISDEMEANOR CONVICTION, OBTAINED BY A PLEA OF GUILTY, TO ENHANCE A SENTENCE, DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON THE RIGHT TO AND NEED FOR COUNSEL.

A conviction obtained after a trial in which the defendant was denied the assistance of a lawyer lacks reliability. Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 1019, 31 L.Ed.2d 374 (1972). The admission of a prior criminal conviction which was introduced for the purpose of enhancing punishment, and which was constitutionally infirm under the standards of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), is inherently prejudicial. Burgett v. Texas, 398 U.S. 109, 88 S.Ct. 258, 262, 19 L.Ed.2d 319 (1967). Both Loper and Burgett were concerned with felony convictions as opposed to misdemeanor convictions. The standard of Gideon, to which this Court referred in Burgett, is that it is unconstitutional to try a person for a felony in a state court unless he has a lawyer or has validly waived one.

In Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), this Court did not state that it is unconstitutional to try a person for a misdemeanor or to accept a guilty plea in a state court unless he has a lawyer or has validly waived one. It stated:

> We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail. 92 S.Ct. 2006 at 2012.

Constitutionally obtained convictions may be used collaterally. Therefore, in the present case, the Illinois Court's use of the petitioner's uncounseled misdemeanor conviction, which did not result in imprisonment, to enhance his sentence, is proper.

As the Illinois Appellate Court reasoned,

> In Argersinger, the court held that no person may be imprisoned for any offense, petty, felony or misdemeanor, unless he is represented by or has effectively waived his right to counsel at trial. It directed itself only to cases wherein an uncounseled defendant had been convicted of a criminal offense and was then sentenced to imprisonment for that offense and that conviction. There is no language in the opinion suggesting a prospective application or readjudication of a defendant's right to counsel should he be convicted in the future of the commission of another offense and be then subject to another sentence. The notion that repeat offenders are subject to enhanced penalties for their conduct is so basic to our criminal justice system that it could not have escaped the notice of the Argersinger court. Yet, it carefully limited its holding to a conviction and the sentence imposed for that conviction.
>
> (emphasis added)

People v. Baldasar, 52 Ill. App. 3d 305, 10 Ill. Dec. 71, 367 N.E.2d 459, 461 (2d Dist. 1977).

This Court stated that under the rule announced in Argersinger,

> . . . every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.
>
> The run of misdemeanors will not be affected by today's holding. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy. 92 S.Ct. 2006 at 2014.

However, if this Court were to prohibit the use of counseless misdemeanor convictions for enhancement purposes, as the petitioner suggests, the decision whether to appoint counsel would have to be made in each misdemeanor trial, not only on the basis of whether imprisonment would be an available sentencing alternative, but also on the basis of whether, if convicted and only fined, the conviction would have a potential collateral effect on liberty. The "run of misdemeanors" would be affected by such a decision. Such a holding would, in effect, extend the right to counsel in all misdemeanor cases.

In Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973), the court made a distinction between a conviction without assistance of counsel where a jail sentence was imposed and one where there was no jail sentence. Cottle involved a parole revocation. The Court held that a parole could not be revoked on the basis of prior invalid convictions and that, since Cottle's first misdemeanor conviction, without assistance of counsel, did not result in his imprisonment, the conviction was valid and could be considered. However, the Court held that a second such conviction, which did result in a sentence of imprisonment, was constitutionally invalid and could not be considered.

On appeal in the Illinois Appellate Court, the petitioner admitted that his first theft conviction was not void under Argersinger. People v. Baldasar, 367 N.E.2d 459 at 461. Yet, petitioner claims that counseless misdemeanor convictions, such as his first theft conviction, are "inherently unreliable" when obtained without counsel. Petition for Writ of Certiorari at 4. If not void when adjudicated, a conviction can be no less valid in the future when used to enhance a sentence. To say that a conviction is valid but unreliable is unreasonable.

C O N C L U S I O N

For the foregoing reasons, respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois,

DONALD B. MACKAY,

MELBOURNE A. NOEL, JR.,

KENNETH A. GRNACEK,
Assistant Attorneys General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601

Attorneys for Respondents.

SANDRA L. ARENDT
Assistant Attorney General

Of Counsel.

1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6219

THOMAS BALDASAR, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

(ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT)

Petr's Supplemental Brief

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER

ORIGINAL COPY

Mary Robinson, Deputy Defender
Michael Mulder, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6219

THOMAS BALDASAR, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

(ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT)

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER

This Court in an order dated May 30, 1978, accepted certiorari in a case presenting the question of whether the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel when a defendant is charged with an offense punishable under State law by imprisonment, regardless of whether the defendant is in fact imprisoned. Scott v. Illinois, (No. 77-1177, May 30, 1978). If this Court resolves the question in favor of the accused, the State's argument here that it is not unconstitutional to try a person for a misdemeanor without an attorney or a valid waiver of counsel is totally undercut. Should the Court so decide, then petitioner's underlying counselless misdemeanor conviction, obtained by a guilty plea would be invalid and could not, under the precedent of Burgett v. Texas, 398 U.S.109, 88 S.Ct.258, 19 L.Ed.2d 319 (1967), be used to enhance his sentence.

Even in the event that Scott is decided unfavorably to the petitioner, this case presents the closely related question of whether uncounseled misdemeanor convictions which did not result in imprisonment can later be used to enhance a sentence. The liberty interest here is of course much greater than in Scott, where only a $50 fine was imposed, for as the dissenting Appellate Judge noted, "Here, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence." People v. Baldasar, 52 Ill.App.3d 305, 367 N.E.2d 459, 466 (Rechenmacher, P.J., dissenting).

The State agrees that felony convictions obtained without counsel are unreliable, but argues that this does not apply equally to misdemeanor convictions which do not result in imprisonment. The argument is not persuasive because it never faces the point that uncounseled misdemeanor convictions used later to enhance a penalty are unreliable for the very same reasons that counselless felony convictions have been held to be unreliable by this Court. Neither type of conviction can be relied upon to enhance a sentence since defending against misdemeanor convictions presents similar problems to those involved in felony prosecutions which are beyond the competence of the accused. Potts v. Estelle, 529 F.2d 450, 454 (5th Cir. 1976). The fact that a sentence was not imposed in the petitioner's prior misdemeanor conviction adds nothing to the reliability of that conviction and the State should not be allowed to assert that fact as a distinguishing characteristic.

The State's final claim is that the "run of misdemeanors" would be affected if uncounseled convictions were not allowed to be used for enhancement purposes. The majority of the jurisdictions cited in the petition for certiorari belie this argument, since accepting the argument petitioner makes here has not drastically altered those states' enhancement provisions. The State may still enhance a conviction; however, to do so the State must first show that a defendant was represented by counsel or intelligently waived the same,

before the prior conviction may be the basis for a subsequent higher offense.

For the compelling reasons stated in our Petition and in this Supplemental Brief and Reply we respectfully request that this Honorable Court grant certiorari.

Respectfully submitted,

Mary Robinson, Deputy Defender
Michael Mulder, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner.

Supreme Court, U. S.
FILED
JUN 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1978

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PEOPLE OF THE STATE OF ILLINOIS,

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF FOR THE PETITIONER

MARY ROBINSON
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State Appellate Defender
First Judicial District
130 North Wells Street, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:
Ralph Ruebner
Peter Nolte

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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OCTOBER TERM, 1978

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THOMAS BALDASAR,

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 52 Ill.App.3d 305, 367 N.E.2d 462 (1977) and is reproduced in the Appendix (hereinafter "A") at pages A. 19-30. The unreported order of the Illinois Supreme Court denying the petition for leave to appeal appears at A. 31.

JURISDICTION

The order of the Illinois Supreme Court denying the petition for leave to appeal was entered on November 23, 1977. The petition for a writ of certiorari was timely filed on February 18, 1978. Certiorari was granted on March 19, 1979. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments to the United States Constitution prohibit the use of a prior uncounseled misdemeanor conviction, which did not result in imprisonment, to increase a sentence of imprisonment on a subsequent conviction under an enhanced penalty statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The enhanced penalty provision found in *Ill. Rev. Stat.*, 1974, Ch. 38, par. 16-1(e)(1), provides:

> (e) Sentence.
>
> (1) Theft of property not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft is a Class 4 felony.

The sentencing provision for misdemeanors found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-3(a)(1), provides in pertinent part:

> (a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:
>
> (1) for a Class A misdemeanor, for any term less than one year.

The sentencing provisions for felonies found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-1(b)(5), and (c)(5), provide in pertinent part:

> (b)(5) for a Class 4 felony, the maximum term shall be any term in excess of one year not exceeding 3 years.
>
> (c)(5) for a Class 4 felony, the minimum term shall be one year in all cases.

The parole provision found in *Ill. Rev. Stat.*, 1975, Ch. 38 §1005-8-3(e)(3), provides in pertinent part:

(e) Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:

(3) for a Class 4 felony, 2 years.

The place of confinement for a misdemeanor found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-6(b), provides in pertinent part:

(b) Offenders sentenced to a term of imprisonment for less than one year may be committed to the custody of the sheriff.

The place of confinement for a felony found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-6(a), provides in pertinent part:

(a) Offenders sentenced to a term of imprisonment for a felony shall be committed to the penitentiary system of the Department of Corrections.

The provisions on counsel found in *Ill. Rev. Stat.*, 1975, Ch. 38, §113-3(a) and (b) provide in pertinent part:

(a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. . . .

STATEMENT OF THE CASE

Thomas O. Baldasar was charged by information with the theft of one "Dial Massage" having a value of less than $150.00 from Montgomery Ward and Company on November 13, 1975, in DuPage County, Illinois. (A.2)[1] The information alleged that Mr. Baldasar was previously convicted of theft on May 1, 1975, thereby raising the misdemeanor charge to a felony charge under *Illinois Revised Statutes*, 1974, Chapter 38, Section 16-1(a)(1). (A.2)

The jury trial commenced on July 27, 1976. The State presented two witnesses to support the charge. The first was Dan Timmerman, who was employed on November 13 as a security manager at the Montgomery Ward Store in the Yorktown Shopping Center in Lombard. (R.32) Sometime during the day he received a call from Mary Wilkerson, who was on the security staff, and in response to the call he went to the camera department and observed a man there. (R.33)

When Timmerman initially saw this person he was approximately thirty feet across the aisle from him. Timmerman followed him as he walked over to the cosmetics department. Timmerman then went upstairs to an observation post or blind, and observed this man approach the shelf where the shower massage heads were located. (R.33-34) According to Timmerman, this

[1] The prefix "R" denotes a page from the transcript of the record of the trial that has not been reproduced in the Appendix. Also used herein is the prefix "RC" which refers to the portions of the common law record (i.e., pleadings, motions, etc.) which have not been reproduced in the Appendix. References to the Appendix are made with the prefix "A".

person then took one of the shower heads off the shelf, put it underneath his arm, and walked directly out of the store into the mall. (R.34) Timmerman identified this person as the petitioner, Thomas Baldasar. (R.34-35)

People's Exhibit No. 1 was identified by Timmerman as the shower massage head in question, which he took from Baldasar after following him out of the store and into the mall. According to Timmerman, when Baldasar left the store he walked past two cash registers without paying. (R.35-36) Timmerman testified that when he stopped the petitioner, Baldasar said that he did not have a receipt for the shower head but that he had paid for it. (R.37) Baldasar then went peacefully with Timmerman to the security office and was placed under arrest. (R.37, 43)

After identifying People's Exhibit No. 2 as the Montgomery Ward's Charter issued by the Secretary of State, and testifying that the value of the shower head in question was $29.88, the witness was excused. (R.40-43)

The State then called Mr. Sol Valiery who testified that he was a store manager for the Jewel Food Stores. (A.4) Valiery then testified that on May 1, 1975, he was in the Oak Park Village Hall courtroom testifying against Mr. Baldasar, whom he identified in court, on a charge of shoplifting. (A.5) Valiery testified that after a bench trial the judge found Baldasar guilty and fined him $159.00. (A.6) Valiery testified that he signed a complaint against Baldasar and then identified his signature on a document, People's Exhibit No. 3. (A.6)

The State offered into evidence People's Exhibit No. 3, which was a certified copy of a "Half-Sheet" (docket

entry) from the court records of the Circuit Court of Cook County.[2] Defense counsel objected on two grounds.[3] First, there was a discrepancy between the name on the complaint and the petitioner's name. Second, defense counsel alleged that there was no affirmative showing that Baldasar had been represented by counsel at the prior trial as was required by *People v. Dixon*, 46 Ill.2d 41, 268 N.E.2d 369, 371 (1971), and by *Burgett v. Texas*, 398 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). (A.7-8) Defense counsel stated that she knew the evidence would show that Baldasar had not been represented by counsel. However, she said the case law required an affirmative showing by the State that the petitioner was represented by or waived counsel before the certified copy of the conviction could be admitted. (A.8) The court denied the petitioner's motion on the basis that the prior offense was "not a felony." (A.9) Thereafter, People's Exhibit No. 3 was admitted into evidence. (A.9)

On cross-examination Mr. Valiery testified that when he was present in the Oak Park Village courthouse Mr. Baldasar was not represented by counsel. (A.10) The State rested its case. (R.56)

---

[2]People's Exhibit No. 3 is reproduced in the Appendix at pages 11 through 15. The exhibit consists of the clerk's certificate that the "Half-Sheet and Order" was a true copy of the original (A.11-12), the complaint (A.13-14), and the "Half-Sheet" listing the docket entries in the cause. (A.15) The half-sheet indicates that Mr. Baldasar's sentence was a fine of $159.00 and one year of probation. (A.15)

[3]The written motion setting forth the grounds for not admitting the certified copy of conviction into evidence was filed on the day of trial and appears at A.3.

Thomas Baldasar then testified that on November 13, 1975, he was in the Yorktown Shopping Center in Lombard, when he entered the Montgomery Ward Store on a lower level, carrying one Dial Massage. (R.57-58) He was intending to return the Dial Massage to the department from which he had purchased it. (R.58)

Baldasar testified that he did not have a sales slip with him at that time and that he went to the cosmetics department but saw no one at the cash register. He testified that he waited around for someone to arrive at the cash register, and that while he was waiting he looked at other items in nearby departments, where he was apprehended by a security person. (R.59-60) He explained to the officer that he was returning merchandise and that he did not have a receipt. He was then taken downstairs to the security office. (R.60-61)

Baldasar testified that he had purchased the Dial Massage approximately one week earlier and had paid approximately $29.00. (R.61) He restated his testimony that he never left the store with the shower head after he had entered, and that he was apprehended inside the store. (R.63-64)

After this testimony, the State introduced People's Exhibit No. 4, which was a certified copy of a 1967 conviction pursuant to a plea of guilty to a charge of armed robbery. (R.65-69)[4] Thereafter arguments were heard. The jury was instructed and returned a verdict of guilty. The petitioner was subsequently sentenced to

[4]This prior conviction was not the basis for the enhanced penalty, but was offered on the question of petitioner's credibility. (R.9, 92)

not less than one nor more than three years in the Department of Corrections. (R.106-107, A.16) A notice of appeal was timely filed. (RC.85)

A divided panel of the Appellate Court of Illinois, Second District, rejected petitioner's argument that the Sixth and Fourteenth Amendments prohibited use of a prior uncounseled misdemeanor conviction, absent a showing of waiver, to enhance his theft conviction to a felony and subject him to much more severe penalties. (A.19-30) The Illinois Supreme Court denied his petition for leave to appeal without comment. (A.31)

SUMMARY OF ARGUMENT

In *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), this Court held that absent a knowing and intelligent waiver of counsel, no person may be imprisoned for an offense regardless of whether it is classified as a felony or a misdemeanor. As in felony cases, "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial." 407 U.S. at 36-37. *Argersinger* commanded that no imprisonment result from an uncounseled conviction. This was violated where petitioner's prior fine-only uncounseled theft conviction was used over objection to raise the present misdemeanor theft offense to a felony and enhance the punishment. The direct consequence of the use of this prior uncounseled misdemeanor conviction was an extra two years of incarceration; without the enhanced punishment, petitioner could have received only a sentence of less than one year, rather than the one- to three-year sentence imposed.

Scott v. Illinois, ___ U.S. ____, 99 S.Ct. 168, 59 L.Ed.2d 383 (1979), is consistent with *Argersinger* in adopting actual imprisonment as the line defining the constitutional right to appointment of counsel. Scott's misdemeanor theft conviction without counsel was upheld because he was sentenced only to pay a fine. Petitioner Baldasar's similar uncounseled misdemeanor conviction would also support imposition of a fine. However, before the severe sanction of deprivation of liberty could result from such a conviction, due process and the Sixth Amendment would require the presence or intelligent waiver of counsel to assure a fair trial and a reliable result.

Had Scott been incarcerated for even a brief period of time, his uncounseled conviction would have been unconstitutional under *Argersinger*. Absent a waiver, liberty could not be deprived without the necessary safeguard of counsel to assure the fairness and reliability of the trial. The Constitution requires a finding that such a conviction also lacks the degree of reliability necessary to support an enhanced sentence and deprivation of liberty at a subsequent date.

Uncounseled felony convictions will not be allowed to enhance punishment for another offense. *Burgett v. Texas*, 383 U.S. 109, 88 S.Ct. 258, 18 L.Ed.2d 319 (1967). There is nothing in *Burgett* to suggest that its rationale is limited to felonies, for counselless misdemeanor convictions are no more reliable than counselless felony convictions. Petitioner contends that while his prior uncounseled misdemeanor conviction may support a fine, the rule of law should prohibit it from supporting enhanced imprisonment for another offense, absent a showing that he was represented by or intelligently waived counsel.

The majority of jurisdictions considering the issue has adopted the above-stated rule as constitutionally required. Such a rule would not affect the "run of misdemeanors," while at the same time it would assure that the constitutional command of no imprisonment without representation by counsel was met. States would not have to afford counsel in all misdemeanor prosecutions. Uncounseled convictions resulting in no imprisonment would still be valid. However, defendants should be represented by counsel, or intelligently waive counsel, if their first convictions are to be used as the basis for enhancing a second sentence which actually results in imprisonment.

ARGUMENT

THE SIXTH AMENDMENT RIGHT TO COUNSEL FORBIDS THE USE OF A FINE-ONLY UNCOUNSELED MISDEMEANOR CONVICTION TO INCREASE PETITIONER'S IMPRISONMENT ON A SUBSEQUENT OFFENSE UNDER AN ENHANCED PENALTY STATUTE.

A. Actual Imprisonment Without Representation In Violation of *Argersinger* and *Scott* Resulted When Petitioner's Prior Uncounseled Misdemeanor Conviction Was Used To Enhance Petitioner's Subsequent Imprisonment By Two Years.

In *Scott v. Illinois*, 59 L.Ed.2d 383, 389 (1979), this Court clarified its prior decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and held that actual

imprisonment was the line defining the constitutional right to the appointment of counsel. Under this approach, petitioner Baldasar's prior uncounseled misdemeanor theft conviction for which he was fined $159 was a valid conviction like that of petitioner Scott.[5] However, when the trial court in this case overruled petitioner's objection to the introduction of the prior theft conviction for purposes of raising the present misdemeanor theft charge to a felony, the petitioner's constitutional right not to be imprisoned on the basis of an uncounseled conviction was violated. As the dissenting appellate court justice noted, "[h]ere, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence." (A.30).

Argersinger held that the denial of the assistance of counsel would preclude the imposition of a jail sentence. *Scott v. Illinois* is consistent with this principle, since this Court acknowledged the difference between a fine or the mere threat of imprisonment and actual incarceration. There was no constitutional right to counsel in *Scott*, since the fine imposed was a much less severe sanction than deprivation of liberty.

---

[5]Petitioner was also sentenced to a one-year term of probation. (R.15) Petitioner did not challenge this sentence on direct appeal. Had petitioner appealed the issue the court may have been unwilling to affirm the sentence of probation because it might ripen into unconstitutional imprisonment. (See *United States v. White*, 529 F.2d 1390 (8th Cir., 1976), explained in subsection C of the brief). However, under *Scott v. Illinois*, the prior uncounseled theft conviction and fine would have been affirmed. Thus, the sentence of probation does not affect the question presented in this case.

Petitioner Baldasar's prior uncounseled conviction, like Scott's conviction, is constitutionally valid. However, if incarceration had been imposed at the time of sentence it would be presumed invalid, since counsel was not present, and there was no showing that Baldasar was notified that he was entitled to retain counsel[6] or, if indigent, to have counsel provided. Petitioner Baldasar's conviction, like Scott's conviction, would not support a sentence of imprisonment as a direct result of his uncounseled misdemeanor trial. If the State is precluded from imposing imprisonment on the initial sentencing date, it must also be precluded from using this counselless misdemeanor conviction in a separate proceeding to enhance punishment. Neither *Argersinger* nor *Scott* can be distinguished merely because the imprisonment results on a later day.

The immediate result of petitioner Baldasar's prior uncounseled conviction for theft was not imprisonment in the penitentiary. Rather, he was fined and placed on probation. However, but for the existence of Baldasar's prior uncounseled misdemeanor theft conviction, the State would not have been allowed to prosecute the instant thirty-dollar misdemeanor theft as a felony which resulted in a sentence of one to three years' imprisonment in the penitentiary, as opposed to another institution.[7] The additional two years' im-

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[6]*Illinois Revised Statutes*, 1975, Chapter 38, §113-3(a), provides that every person charged with an offense shall be allowed counsel before pleading to the charge.

[7]*Illinois Revised Statutes*, 1975, Chapter 38, §1005-8-6(b), allows misdemeanants to be committed to the custody of the sheriff. Petitioner also suffered a two-year parole term which automatically accompanied a conviction for a Class 4 felony in Illinois. *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-1(e)(3). No parole term is imposed upon those convicted of misdemeanors.

prisonment is directly attributable to the prior uncounseled misdemeanor conviction. Such a result violates the command of *Argersinger* that in those misdemeanors "... that end up in the actual deprivation of liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy". 407 U.S. at 40. Not only does the use of the prior uncounseled conviction violate the no imprisonment holdings in *Argersinger* and *Scott*, but as demonstrated below it also conflicts with the rationale of these decisions.

B. Convictions Obtained In The Absence Of Counsel Or Waiver Thereof Lack The Degree Of Reliability Necessary To Support An Enhanced Punishment Which Results In A Deprivation Of Liberty.

It has often been said by this Court that due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *Argersinger* and *Scott* consistently follow this approach. Since a deprivation of liberty is a more severe sanction than a fine, the Constitution requires the additional safeguard of counsel or waiver of counsel in cases resulting in actual imprisonment. Convictions obtained without the guiding hand of counsel do not have the degree of reliability necessary to justify punishment either as a direct or a collateral result.

Because uncounseled convictions do not have the requisite degree of reliability, they cannot support imprisonment regardless of whether it occurs at the

time of conviction or in a subsequent proceeding to enhance punishment. This Court has precluded the use of an uncounseled felony conviction to "support guilt or enhance punishment" in *Burgett v. Texas*, 389 U.S. 109, 115 (1967). The *Burgett* rule was founded on the recognition that the absence of counsel "... so jeopardizes the fairness of the trial that any ensuing conviction is likely to be unreliable." *Gilday v. Scafati*, 428 F.2d 1027, 1029 (1st Cir., 1970). *See also, Loper v. Beto*, 405 U.S. 473, 483, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), which approved the holding of *Gilday, v. Scafati*, and agreed that the absence of counsel impairs the reliability of the conviction. Under the rationale of *Burgett* this Court should not allow uncounseled misdemeanor convictions to support guilt or enhance punishment.

This Court in *Argersinger* recognized that regardless of whether the offense was classified as a felony or misdemeanor, without counsel's assistance, even one not guilty faced the danger of conviction because he did not know how to establish his innocence.[8] *Argersinger*,

[8] In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Court ruled that a defendant could represent himself if he voluntarily and intelligently chose to do so. In so ruling the majority recognized that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts". 422 U.S. at 834. Three Justices of the Court believed counsel to be so indispensible that a defendant had no constitutional right to be tried without counsel. The Chief Justice emphasized the absolute necessity of counsel for a fair trial observing "that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." 422 U.S. at 838 (dissenting). Justice Blackmun made reference to the old proverb in stating that the Court had bestowed a constitutional right to make a fool of oneself by self-representation. 422 U.S. 852 (dissenting).

407 U.S. at 31. Questions presented in a case which lead to imprisonment even for a brief period of time are often complex and beyond the usual competence of the accused:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), quoted in *Argersinger v. Hamlin*, 407 U.S. at 29.[9]

[9]The Chief Justice in his opinion concurring in the result echoed these remarks in stating.

> . . . [A]ny deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman when he is opposed by a law trained prosecutor.

Argersinger, 407 U.S. at 41.

In *Burgett v. Texas*, 389 U.S. 109 (1967), proof of the prior conviction was an element of the State's case in chief and, like the instant case, the prior conviction was alleged in the charging instrument. The prosecution in *Burgett* introduced a prior Tennessee conviction over the objection that it did not facially indicate whether counsel was present or had been waived. This Court reversed the case because the records of the prior conviction on their face raised a presumption that Burgett was denied his right to counsel in the Tennessee proceeding, and therefore his conviction was void. 324 U.S. at 114-115.

Petitioner Burgett was imprisoned for his prior uncounseled conviction, while the present petitioner was not. This fact, however, should not serve to distinguish the two cases, for the absence of imprisonment on petitioner's first theft conviction adds nothing to its reliability. Both Burgett's and petitioner's convictions are unreliable to the same degree because of counsel's absence, and it is that fact that should control. In *Burgett* it was recognized that the accused was suffering anew[10] from the initial deprivation of counsel. 389 U.S. at 115. Petitioner Baldasar, on the other hand, did not suffer imprisonment as a result of his uncounseled conviction until the subsequent conviction when his sentence was enhanced. However, the resulting imprisonment was just as unconstitutional as if he had been imprisoned on his first conviction.

[10]*Burgett's* recognition that the right was being denied anew is contrary to the state court's view that Baldasar's prior uncounseled conviction did not result directly or collaterally in imprisonment for that offense. (A.24)

C. The Majority Of Jurisdictions Confronting The Issue Has Prohibited The Use Of Such Uncounseled Misdemeanor Convictions Without Affecting The "Run Of Misdemeanors."

Petitioner's approach set forth above has been followed by the great majority of courts that has reviewed the issue. In *City of Monroe v. Fincher*, 305 So.2d 108 (La., 1974), the Louisiana Supreme Court prohibited an uncounseled first offense for driving while under the influence of intoxicants from being used to enhance a second conviction for the same offense. Like Baldasar, Fincher had not been imprisoned for the first offense, but the court reasoned that *Argersinger* was violated:

> . . . It may readily be seen that under the statutory scheme for DWI, the first conviction causes imprisonment after a second conviction of the accused for DWI–that first conviction *ends up* in defendant's imprisonment, although such imprisonment does not immediately succeed the first conviction. Before a conviction for any offense *may result* in imprisonment, an accused must have been represented by counsel or have knowingly and intelligently waived the assistance of counsel, as we appreciate the import of the *Argersinger* decision. (emphasis original)

City of Monroe v. Fincher, 305 So.2d 108, 110 (La., 1974). Because the record of Fincher's first conviction did not establish that he had counsel or had made a waiver of counsel, the conviction could not be used under the second-offender provision. The *Fincher* holding was later applied by the same court in a case where it also relied on *Burgett v. Texas*, 389 U.S. 109 (1967). *See, State v. Strange*, 308 So.2d 795 (La., 1975).

In agreement is *Mure v. State*, 478 P.2d 926, 928 (Okla. Crim. App., 1970), where the court refused to find *Burgett v. Texas* distinguishable on the basis that it applied only to felonies. In addition, *State v. Kirby*, 33 Ohio Misc. 48, 51-52, 289 N.E.2d 406, 408 (1972), relies on *Argersinger* and *Burgett* for the proposition that when an uncounseled conviction, upon which the defendant was only fined, is used to support guilt or enhance punishment, "it effectively becomes a 'serious offense' (here a felony), which requires that the records of prior convictions show that defendant was represented by counsel . . .", or waived counsel, before it can be used in the subsequent prosecution. Prior to *Argersinger*, this same approach was employed in *State v. Reagan*, 103 Ariz. 287, 289, 440 P.2d 907, 909 (1968). In light of *Gideon v. Wainwright*, 372 U.S. 335 (1961), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Burgett v. Texas, supra*, the Supreme Court of Arizona found that a prior fine-only counselless conviction of petty theft could not be used to enhance punishment.

Similar approaches have been taken in other jurisdictions in somewhat analogous situations.[11] In

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[11]The majority panel of the state appellate court held that if the *Argersinger* principle were applied to petitioner's case, there would be little rational reason why it would not preclude the introduction of such convictions for impeachment or use at a sentencing hearing. (A.25). The dissent distinguished these situations from the enhancement context because imprisonment *via* enhancement was a far more direct consequence from the use of the prior conviction than other instances where the convictions was used. (A.28-29).

Initially, it should be noted that these questions concerning the collateral consequence with regard to impeachment and sentencing were not before the court. Petitioner agrees with the

(continued)

Morgan v. State, 235 Ga. 632, 221 S.E.2d 47 (1975), the Georgia Supreme Court refused to allow an uncounseled misdemeanor conviction for which only a fine was imposed to be considered at the sentencing phase of the case absent a valid waiver of counsel.

In *State v. Harris*, 312 So.2d 643 (La., 1973), the court prohibited a plea of guilty to possession of marijuana, where a fine-only had been imposed, to be used as a basis to revoke probation, where the State did not demonstrate that the defendant's plea had been made with the benefit of counsel or that the defendant had waived his right to counsel.

In *Alexander v. State*, 527 S.W.2d 927, 929 (Ark., 1975), the Arkansas Supreme Court refused to allow an uncounseled misdemeanor conviction and sentence which did not include imprisonment to be the sole basis

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(footnote continued from preceding page)

dissenting state court judge that imprisonment in the enhancement situation is a more direct result of the prior uncounseled conviction than in other situations. The discussion of the analogous cases is relevant to show that even where the effect of the conviction is more remote, courts are refusing to rely on such convictions that do not evince the necessary degree of reliability. In the event this Court reaches the questions of whether an uncounseled conviction can be used to impeach a defendant, to revoke a suspended sentence, to revoke parole or probation, or to be considered in determining the proper sentence, petitioner urges that unreliable convictions be prohibited from contributing in any manner to a conviction or sentence that results in imprisonment. As this Court stated in *Loper v. Beto*, 405 U.S. 473, 483 (1972): "The absence of counsel impairs the reliability of the conviction just as much as when used to impeach as when used as direct proof of guilt." Nor should it be used for sentencing. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972).

to revoke a suspended sentence because only a fine was assessed, stating "... we interpret *Argersinger v. Hamlin* as holding that an uncounseled municipal court conviction involving only a fine, and valid for that purpose, cannot be collaterally used to deprive a person of his liberty". The court noted that it was in agreement with the author of the law review article entitled *Argersinger v. Hamlin and The Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented By Counsel At Trial*, 35 Ohio St.L.J. 168 (1974). That writer had reasoned that the collateral use of a counselless misdemeanor conviction would soon vitiate the right of counsel as stated in *Argersinger* and be contrary to the conclusions expressed in the last paragraph of that decision.

Also agreeing with the commentator noted above was the court in *Commonwealth v. Barrett*, 322 N.E.2d 89, 93 (Mass. App., 1975), quoting the passage that: "Since the Court prohibited imprisonment based upon an unreliable conviction obtained at an unfair trial, the Court would probably not permit unreliable trials to have a delayed impact resulting in imprisonment." In view of this, defendant Barrett's conviction was reversed. The court held that prior uncounseled misdemeanor convictions, themselves constitutionally proper under *Argersinger* because only fines were imposed, could not constitutionally be used for impeachment in a subsequent proceeding that led to imprisonment. *Commonwealth v. Barrett* was cited with approval by the Massachusetts Supreme Court in *Carey v. Zayer of Beverly Inc.*, 324 N.E.2d 619 (Mass., 1975) (the court found that *Barrett* would not forbid the use of such convictions in a civil suit, since *Argersinger* does

not prohibit the imposition of fines in uncounseled trials).

In *Martson v. Oliver*, 485 F.2d 705, 708 (4th Cir., 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652,, 41 L.Ed.2d 240 (1974), the court interpreted the scope of *Argersinger*:

> In sum, *Argersinger* purported to excise from the misdemeanor conviction only those consequences that related to loss of liberty and imprisonment. So far as its direct or collateral consequences are the loss of liberty on the part of the defendant, *Argersinger* applies. . . .

The consequences of the enhanced imprisonment that petitioner Baldasar received are somewhat similar to the circumstances that arise when a petitioner is tried without counsel and receives a suspended sentence. In both situations the defendant does not directly go to jail, but may face incarceration as the result of a subsequent violation. In *United States v. White*, 529 F.2d 1390 (8th Cir., 1976), the court was of the opinion that when a judge chooses to try an indigent defendant without counsel he loses not only the alternative of sentencing the defendant directly to jail, but also the alternative of giving a suspended sentence which might later ripen into an unconstitutional deprivation of liberty at a later day. Therefore, the court in *United States v. White* vacated the suspended sentence, while affirming the conviction and fine.

Thus, the majority of cases[12] concerning the issue

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[12]Cases to the contrary exist and include *State v. McGrew*, 127 N.J. Super 327, 317 A.2d 390 (1974); and *Aldrighetti v. State*, 507 S.W.2d 770 (Tex.Crim.App. 1974), but see Presiding Justice Onion's dissent which points out the following possible inconsistencies in such a ruling:

(continued)

presented here, as well as cases in analogous areas, adopt the approach suggested by petitioner Baldasar. The cases cited above belie the argument made by the majority panel of the state appellate court (A.21) that were the court to accept the petitioner's argument, the "run of misdemeanors" would be affected. 407 U.S. at 40. The states above still employ enhancement statutes. Moreover, the fact remains that under *Scott v. Illinois*, there would be no question that counselless misdemeanor convictions resulting in fine only would still be constitutionally valid. Petitioner simply asks that the States be precluded from using counselless misdemeanor convictions for enhancing penalties which result in actual imprisonment in subsequent prosecutions. A similar holding can be found in *Mure v. State*, 478 P.2d 926, 928 (Okla.Crim.App., 1970):

(footnote continued from preceding page)

> Under today's new rule, an accused who was convicted of a misdemeanor pre-*Argersinger* without counsel where the trial judge or jury had the full range of possible penalties, including imprisonment, before it for consideration and who decided under the circumstances of the case that a fine only was the appropriate punishment can have that conviction used against him again for enhancement of punishment in another case or for the purpose of impeachment. On the other hand, under the rule announced today, if a defendant was convicted of a misdemeanor, pre-*Argersinger*, without counsel, and the assessor of punishment determined that the proper punishment was imprisonment, then such conviction cannot be used for enhancement of punishment or for impeachment.
>
> Which type of such prior conviction really has the greatest bearing on the credibility of the accused in a future case when he is a witness on his own behalf? The question answers itself. 507 S.W.2d at 775.

> We are not stating that a defendant must be represented in all misdemeanors. We are of the opinion that a defendant should be represented by counsel, or intelligently waive the same, in all cases wherein a first conviction may be the basis for a subsequent higher offense.

Petitioner Baldasar contends that the Sixth and Fourteenth Amendments require the adoption of a similar rule which would assure that enhanced punishment would flow only from those prior convictions where a criminal defendant was represented by or intelligently waived counsel. It is only in that manner that this Court can assure that a conviction is sufficiently reliable to be a valid basis for depriving one of his liberty.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

MARY ROBINSON
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State Appellate Defender
First Judicial District
130 North Wells Street, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:

RALPH RUEBNER
Deputy Defender
Office of the State Appellate Defender
130 North Wells Street, Suite 2200
Chicago, Illinois 60606

PETER B. NOLTE
Suite 503
Rock River Savings Building
Rockford, Illinois 61101

Supreme Court, U. S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

No. 77-6219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS BALDASAR,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

DONALD B. MACKAY,

MELBOURNE A. NOEL, JR.,

MICHAEL B. WEINSTEIN,
Assistant Attorneys General,
188 W. Randolph St., Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Attorneys for Respondents.

Printed by the Authority of the State of Illinois—8-79-60

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Illinois Appellate Court, Second Judicial District, is reported at 52 Ill. App. 3d 305, 367 N.E. 2d 459 (2d Dist. 1977), and is reproduced in the Appendix (hereinafter referred to as "A.") at pages A. 19-30. The unreported order of the Illinois Supreme Court denying a petition for leave to appeal is reproduced at A. 31.

JURISDICTION

The Illinois Supreme Court denied a petition for leave to appeal on November 23, 1977. The petition for writ of

certiorari was timely filed in this Court on February 18, 1978, and was granted on March 19, 1979. The jurisdiction of this Court is invoked by petitioner under the provisions of 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether a prior uncounseled misdemeanor conviction, valid under *Scott* v. *Illinois*, may be used to increase a sentence of imprisonment for a subsequent conviction under an enhanced penalty statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., 1973, ch. 38, § 16-1 provides, in pertinent part, that:

> (e) Sentence.
>
> (1) Theft of property not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft is a Class 4 felony.
>
> (2) Theft of property from the person or exceeding $150 is a Class 3 felony.

Ill. Rev. Stat., 1975, ch. 38, § 1005-8-1 provides, in pertinent part, that:

(b) The maximum term shall be set according to the following limitations: . . .

(5) for a Class 4 felony, the maximum term shall be any term in excess of one year not exceeding 3 years. . . .

(c) The minimum term shall be set according to the following limitations: . . .

(5) for a Class 4 felony, the minimum term shall be one year in all cases. . . .

(e) Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, [footnote omitted] the parole term shall be as follows: . . .

(3) for a Class 4 felony, 2 years.

Ill. Rev. Stat., 1975, ch. 38, § 1005-8-3 provides, in pertinent part, that:

(a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:

(1) for a Class A misdemeanor, for any term less than one year.

Ill. Rev. Stat., 1975, ch. 38, § 1005-8-6 provides, in pertinent part, that:

(a) Offenders sentenced to a term of imprisonment for a felony shall be committed to the penitentiary system of the Department of Corrections. . . . A person sentenced for a felony may be assigned by the Department of Corrections to any of its institutions, facilities or programs.

(b) Offenders sentenced to a term of imprisonment for less than one year may be committed to the custody of the sheriff. All offenders above the age of 17 years who are sentenced to 60 days or more to jail may be committed to the Department of Corrections. . . . A person committed to the Department of Corrections for less than one year may be assigned by the Department to any of its institutions, facilities or programs.

STATEMENT OF THE CASE

On April 8, 1975, Mr. Sol Valiery, a store manager for the Jewel Food Stores, swore out a criminal complaint charging Thomas Baldasar (hereinafter referred to as "petitioner") with the misdemeanor offense of Theft (under $150.00). (A. 13-14) Subsequently, on May 1, 1975, petitioner appeared in the Circuit Court of Cook County, Illinois, at which time he entered a plea of not guilty and waived a jury trial. (A. 15) However, he was subsequently found guilty of the offense by the Honorable Thomas Cawley.(A. 15) Judge Cawley sentenced petitioner to one (1) year of probation and fined him $159.00. (A. 15) This conviction and sentence has never been appealed.

Approximately seven and one-half (7½) months later, petitioner was charged, by way of Information, with the felony offense of Theft.[1] (A. 2) This latter charge was brought in the Circuit Court of DuPage County, Illinois. (A. 2) The Information alleged that petitioner had:

> [E]xerted unauthorized control over property of Montgomery Ward and Co., Inc., being one Dial Massage, having a total value of less than $150.00, intending to deprive Montgomery Ward and Co., Inc., permanently of the use and benefit of said property. (A. 2)

The Information also alleged that petitioner had previously been convicted of Theft on May 1, 1975. (A. 2)

Petitioner was brought to trial, before a jury, on July 2, 1976. (RC. 95; R. 1)[2] The State presented testimony from two

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[1] *See Ill. Rev. Stat.*, 1973, ch. 38, § 16-1(e), which is set out verbatim under "Constitutional and Statutory Provisions Involved". This statute provides that theft of property not from the person and not exceeding $150.00 in value is denominated a Class A misdemeanor. Theft of property from the person or property exceeding $150.00 in value is denominated a Class 3 felony. Finally, a second or subsequent offense after a prior misdemeanor theft conviction is a Class 4 felony.

[2] "RC." refers to the common law record (*i.e.*, pleadings, motions, etc.), while "R." refers to the trial transcript.

witnesses in support of the charge. The first witness was a Dan Timmerman, who was the security manager for the Montgomery Ward Department Store located in the Yorktown Shopping Center in Lombard, Illinois. (R. 32) Mr. Timmerman stated that on November 13, 1975, while working at the Yorktown store, he received a call from a Mary Wilkerson, who was also on the security staff at that time. (R. 33) In response to that call, he proceeded to the store's camera department where he observed a man "looking suspicious". (R. 33) Mr. Timmerman followed this person as he walked over to the cosmetics department. (R. 33) At that time, Mr. Timmerman went upstairs to a hidden observation booth or "blind". (R. 33-34) From that vantage point he observed the customer approach the shelf where shower massage heads were located. (R. 34) He watched as the customer took one of the units off the shelf; put it underneath his arm; and walk directly out of the store into the shopping mall. (R. 34) Mr. Timmerman then proceeded to make an in-court identification of the petitioner as being the man whom he had observed. (R. 34-35)

People's Exhibit No. 1 was identified by Mr. Timmerman as being the shower massage head in question. (R. 35) The witness then testified as to the path which the petitioner took out of the store and the fact that he passed two cash registers on his way out without paying for the shower massage head. (R. 35-36) Mr. Timmerman related that he stopped the petitioner when he was approximately 100 feet outside the store and that when he asked the petitioner for a receipt, the petitioner replied he didn't have one but that he had paid for the item. (R. 37) The petitioner was then escorted back to the store's security office where he was placed under arrest. (R. 37)

The security manager also identified People's Exhibit No. 2, which was a copy of the charter to do business in Illinois issued to Montgomery Ward and Co., Inc. by the Illinois Secretary of State's Office. (R. 39) People's Exhibits Nos. 1

and 2 were thereafter admitted into evidence. (R. 40-42) Finally, Mr. Timmerman testified that the retail value of the shower massage head was $29.88. (R. 43) After a short cross-examination (R. 43-44), and re-direct examination (R. 45), the witness was excused. (R. 45)

The only other witness called by the State was Mr. Sol Valiery. (R. 45) Mr. Valiery stated that on May 1, 1975, he testified against the petitioner, whom he identified in-court, in a criminal case heard at the Oak Park, Illinois, Village Hall Court Room. (A. 5) The charge against the petitioner at that time was "shoplifting". (A. 5) Mr. Valiery related that after a bench trial the judge found the petitioner guilty and sentenced him to a fine of $159.00. (A. 6) Mr. Valiery stated that he had signed the complaint against the petitioner and he identified his signature on People's Exhibit No. 3.

The State then offered into evidence said exhibit which consisted of the complaint and the circuit court "half-sheet" (*i.e.* the court docket) from the prior criminal conviction. (A. 7) Defense counsel immediately interposed an oral objection (A. 7), and the court proceedings were adjourned to the judge's chambers, outside the presence and hearing of the jury. (A. 7)

Once in chambers defense counsel offered a written objection (A. 3), and orally expounded upon it. (A. 7-9) Counsel's argument was two-fold. First, counsel alleged that there was a discrepancy between the middle initial of the person listed on the Cook County complaint and the middle initial of the petitioner. (A. 3, 7)[3] Secondly, counsel alleged that there had been no affirmative showing that the petitioner had been represented by counsel at the Cook County trial and that Illinois case law required an affirmative showing of legal representation. (A. 3, 7) The trial court denied defense counsel's motion stating that the cases cited by counsel involved

[3] This allegation was, of course, moot since the State had Mr. Valiery identify the petitioner in open court as being the same person involved in the Cook County proceeding. (A. 7)

felonies and "On the basis of . . . [this case] not being a felony, I will deny your motion." (A. 9) Thereafter, People's Exhibit No. 3 was admitted into evidence. (A. 9)

On cross-examination, Mr. Valiery testified that the defendant was not represented by counsel at the Cook County trial. (A. 10) The witness was then excused and the State rested its case-in-chief. (R. 55-56)

The only witness for the defense was the petitioner. (R. 57) He testified that on November 13, 1975, he entered the Montgomery Ward Store on the lower level and was carrying the Dial Massage with him at that time. (R. 58) He was intending to return the item for which he did not have a sales slip. (R. 58-59) The petitioner testified that he went to the cosmetics department, where he had previously purchased the item, but that he saw no one at the cash register. (R. 59) After waiting for a sales person to come to the register, he went browsing in the nearby paperback book department at which point he was apprehended by security personnel. (R. 60) The petitioner stated that he told a security man that he was returning the merchandise in question but that he did not have a receipt. (R. 61) He was then taken to the security office. (R. 61)

On cross-examination, the petitioner stated that he had bought the item approximately one week prior to November 13th and that it had cost $29.00 plus tax. (R. 61) He reiterated most of his previous testimony and insisted that he had never left the store before being apprehended. (R. 63-64) According to his testimony, he was apprehended only ten (10) or fifteen (15) feet from the cosmetics department. (R. 64) He also stated that he never took a shower head off any shelf while he was in the store. (R. 64) The witness was then excused and defense rested its case. (R. 65)

After the defense rested, the State introduced, for rebuttal purposes, a certified copy of a prior Armed Robbery conviction

to impeach the petitioner's credibility. (R. 65-67) This prior conviction (People's Exhibit No. 4) was admitted into evidence without objection. (R. 67-68) The State then rested. (R. 69)

Final arguments were made to the jury (R. 75-89), after which the jury was instructed (R. 89-95), and allowed to retire for deliberations. (R. 95) After a short period of time (RC. 95), the jury returned a verdict of guilty. (R. 97) The petitioner was subsequently sentenced to the Illinois Department of Corrections for a period of imprisonment of not less than one (1) nor more than three (3) years. (A. 16-18; R. 106) A Notice of Appeal was timely filed on September 8, 1976. (RC. 85)

Subsequently, on August 30, 1977, the Illinois Appellate Court, Second Judicial District, affirmed the petitioner's conviction and sentence in a two (2) to one (1) decision. *People* v. *Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459 (2d Dist. 1977). (A. 19-30) The appellate court held that:

> [t]he *Argersinger* [*Argersinger* v. *Hamlin*, 407 U.S. 25 (1972)] prohibition of imprisonment for any offense after an uncounseled conviction was limited in application to a single case in which a defendant was convicted and was not intended to limit the use of a properly obtained, although uncounseled, conviction in future proceedings based upon subsequent conduct of a defendant. We believe this to be true whether such use of the conviction is sought to be made for purposes of impeachment, sentence determination or, as in the instant case, to establish an element of a second or subsequent offense prosecution for which an enhanced penalty might be imposed.
>
> We do not accept defendant's contention that use of his prior, uncounseled theft conviction results either directly or collaterally in imprisonment for that offense.
>
> 367 N.E.2d at 463. (A.24)

On November 23, 1977, the Illinois Supreme Court denied a petition for leave to appeal. (A. 31) This Court granted a petition for writ of certiorari on March 19, 1979.

SUMMARY OF ARGUMENT

Petitioner's 1975 uncounseled misdemeanor conviction is valid under *Scott* v. *Illinois*, ____ U.S. ____, 99 S.Ct. 1158 (March 5, 1979). Valid criminal convictions can be used for certain collateral purposes, one of which is to enhance punishment for a subsequent criminal violation of certain state laws. Since the petitioner's 1975 misdemeanor conviction is valid and since the State of Illinois properly alleged and proved this conviction at petitioner's second theft trial, petitioner's present conviction and sentence are valid and constitutional.

Any other conclusion would substantially undercut this Court's previous rulings in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, *supra*. A decision in favor of the petitioner would place a much heavier burden upon trial judges when they are called upon to make a pre-trial "predictive evaluation" as to the need for appointment of counsel. Indeed, the net effect may very well be that counsel would be appointed in most, if not all, misdemeanor cases where imprisonment was an authorized penalty, a result which this Court has previously declined to require.

Petitioner's argument that he was imprisoned as a direct result of his original, uncounseled misdemeanor conviction overlooks the fact that his sentence of imprisonment was for the second conviction only and was not an additional or delayed punishment for the original misdemeanor theft offense. Furthermore, it was petitioner's unilateral decision to commit the second theft which has led to his imprisonment and not the fact that he was previously convicted of misdemeanor theft.

Petitioner's argument as to the lack of reliability of the uncounseled misdemeanor conviction must similarly fail. Petitioner has never questioned the accuracy, either factually or legally, of the uncounseled misdemeanor conviction. Moreover, since the uncounseled conviction is valid under *Scott* v. *Illinois*, *supra*, reliance on cases such as *Burgett* v. *Texas*, 389 U.S. 109 (1967), and *Loper* v. *Beto*, 405 U.S. 473 (1972), is misplaced.

ARGUMENT

AN UNCOUNSELED MISDEMEANOR CONVICTION, VALID UNDER *SCOTT* V. *ILLINOIS*, MAY BE USED TO INCREASE A SENTENCE OF IMPRISONMENT FOR A SUBSEQUENT CONVICTION UNDER AN ENHANCED PENALTY STATUTE.

In the recently decided case of *Scott* v. *Illinois*, ____U.S. ____, 99 S. Ct. 1158 (March 5, 1979), this Court upheld the validity of an uncounseled misdemeanor conviction. In so doing, this Court reaffirmed its previous ruling in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), wherein it was stated:

> We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. [footnote omitted]
>
> 407 U.S. at 37.

The *Scott* decision explains the above-quoted language from *Argersinger* in the following terms:

> Although the intentions of the *Argersinger* Court are not unmistakenly clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. [footnote omitted] Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
>
> 99 S. Ct. at 1162.

Thus, there can be no disputing the fact that petitioner's 1975 misdemeanor theft conviction is valid. Indeed, petitioner has conceded its validity both in this Court (Brief for petitioner at 13), as well as in the Illinois Appellate Court. *People* v. *Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459, 461 (2d Dist. 1977). (A.20)

A valid criminal conviction can be used for certain collateral purposes, one of which is to enhance punishment for a subsequent criminal violation of certain state laws.[4] In the instant case, as well as in *Scott v. Illinois*, the petitioner was convicted of misdemeanor theft; that is, theft of property not exceeding $150 and not from the person. *Scott v. Illinois, supra* at 1159; *People v. Baldasar, supra* at 461. (A.20) The relevant statute [*Ill. Rev. Stat.*, 1973, ch. 38, § 16-1(e)] provides that the first such conviction is a Class A misdemeanor, punishable by a fine and/or incarceration for up to one (1) year. *Ill. Rev. Stat.*, 1975, ch. 38, §§ 1005-5-3(d) and 1005-8-3(a)(1). However, a second or subsequent conviction for the same type of offense is denominated a Class 4 felony, punishable by incarceration for a minimum of one (1) year and a maximum of three (3) years. *Ill. Rev. Stat.*, 1975, ch. 38, § 1005-8-1. In order to convict a person for a felony, the state is required to allege, and prove, the prior misdemeanor conviction. *People v. Ramey*, 22 Ill. App.3d 916, 317 N.E.2d 143, 147 (2d Dist. 1974). This requirement was, of course, met in the instant case.

Since the underlying misdemeanor theft conviction is valid and since the state properly alleged and proved said conviction at the trial of petitioner on the instant charge, it is submitted that petitioner's present conviction and sentence are valid and constitutional. Simply stated then, the syllogism that supports

[4] An extensive, though not necessarily exhaustive, list of the crimes in Illinois which provide for enhancement of sentence upon a subsequent conviction can be found in footnote 1 of the *Baldasar* appellate court opinion. *People v. Baldasar, supra* at 462. (A.22)

the State's position is as follows. Petitioner's underlying misdemeanor conviction is valid. Valid convictions can be used for certain collateral purposes, among which is enhancement of sentence. Therefore, the collateral use of an uncounseled misdemeanor conviction for enhancement purposes is proper. *See generally*, Note, *Argersinger v. Hamlin And The Collateral Use Of Prior Misdemeanor Convictions Of Indigents Unrepresented By Counsel At Trial*, 35 Ohio State Law Journal 168, 183 (1974); *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979); *Alexander v. State*, 527 S.W.2d 927, 930-32 (Ark. 1975) (Fogleman, J., dissenting).[5]

[5] Petitioner contends that a majority of those courts which have considered this issue have prohibited the use of uncounseled misdemeanor convictions for later enhancement purposes. Brief for petitioner at 18-24. However, petitioner overlooks the fact that all the opinions upon which he relies were decided prior to *Scott* v. *Illinois*. The one case decided since *Scott* has strongly supported the collateral use of uncounseled misdemeanor convictions. *Griffin* v. *Blackburn*, 594 F.2d 1044 (5th Cir. 1979). In *Griffin*, the Fifth Circuit was faced with the question of the use of uncounseled misdemeanor convictions for impeachment purposes at a subsequent trial. After noting the internal conflict in decisions which had arisen within the Court of Appeals since the decision in *Argersinger* [*Compare Cottle* v. *Wainwright*, 477 F.2d 269 (5th Cir. 1973), *vacated on other grounds*, 414 U.S. 895 (1973), *with Thomas* v. *Savage*, 513 F.2d 536 (5th Cir. 1975), *and Potts* v. *Estelle*, 529 F.2d 450 (5th Cir. 1976)], the Court referred to this Court's opinion in *Scott* and noted that the opinion, "[I]s short, broad and grounded in basic principles. It displays no disposition to distinguish between possible effects, uses or consequences of such convictions. The authorities it cites as being in conflict are quite disparate, factually. Logically, if a conviction is valid for purposes of imposing its own pains and penalties—the 'worst' case—it is valid for all purposes." 594 F.2d at 1046.

Moreover, even some of the jurisdictions which, prior to *Scott*, appeared to support petitioner did, in fact, allow uncounseled misdemeanor convictions to be used for certain collateral purposes for which imprisonment might be imposed. *State* v. *Love*, 312 So.2d 675

(footnote continued on following page)

Any other conclusion would substantially undercut this Court's decisions in *Argersinger* and *Scott* and, perhaps more importantly, create untold confusion among state and federal courts as to the collateral uses of valid prior convictions. The essence of this Court's holdings in *Argersinger* and *Scott* is that a trial judge is able to make a "predictive evaluation" as to the likelihood of imposing imprisonment in the case before him prior to the commencement of trial. *Argersinger v. Hamlin,* 407 U.S. at 42 (Burger, C.J., concurring). However, if petitioner's views are adopted by this Court a trial judge would have to have a gift of prophecy as to a defendant's future behavior when evaluating the need for appointed counsel prior to trial on a misdemeanor charge. Indeed, local prosecutors might very well insist upon counsel in most, if not all, cases so as to preserve the later use of the conviction for enhancement or other collateral purposes. Essentially, defendants would receive appointed counsel in most, if not all, misdemeanor cases in which imprisonment was an authorized penalty, a result which this Court, with full awareness of the various options, declined to require in *Argersinger* and *Scott*. *Scott v. Illinois, supra* at 1162, fn. 4; Note, *Argersinger v. Hamlin And The Collateral Use Of Prior Misdemeanor Convictions Of Indigents Unrepresented By Counsel At Trial, supra* at 184.

Petitioner's main argument in support of his position is that he was, in fact, imprisoned as a direct result of his original,

(footnote continued from preceding page)

(La. App. 2d Cir. 1975); *State* v. *Sanchez,* 110 Ariz. 214, 516 P.2d 1226 (1973); *See, Whorley* v. *Brillhart,* 373 F. Supp. 83 (E.D. Va. 1974).

In any event, respondents believe that the better view among pre-*Scott* cases can be found in decisions such as *Aldrighetti* v. *State,* 507 S.W.2d 770 (Tex. Crim. App. 1974); *Nelson* v. *Tullos,* 323 So.2d 539 (Miss. 1975); and *State* v. *McGrew,* 127 N.J. Super. 327, 317 A.2d 390 (1974), as well as the dissenting opinions in *Alexander* v. *State,* 527 S.W.2d 927, 930 (Ark. 1975); *City of Monroe* v. *Fincher,* 305 So.2d 108, 110 (La. 1974); and *Morgan* v. *State,* 235 Ga. 632, 221 S.E.2d 47, 48 (1975).

uncounseled misdemeanor conviction. Brief for petitioner at 11-14. The fallacy of this argument is that his sentence of imprisonment was for the *second* conviction; it was not an additional or delayed punishment for the original offense. *Cf. Spencer* v. *Texas,* 385 U.S. 554, 559-60 (1967); *McDonald* v. *Massachusetts,* 180 U.S. 311, 312 (1901); *People* v. *Kirkrand,* 397 Ill. 588, 74 N.E.2d 813 (1947) (each case involving an habitual criminal statute). Furthermore, it was petitioner's unilateral decision to commit a second theft which has led to his imprisonment and not the fact that he had previously been convicted of misdemeanor theft. *Cf. Whorley* v. *Brillhart, supra* at 86-87 (construing an habitual traffic offender statute). Had he not committed the second theft there would not have been any deprivation of his liberty.[6] Certainly, under these circumstances petitioner's ultimate imprisonment cannot fairly be characterized as a "direct result" of his first conviction.

Finally, relying upon this Court's decisions in *Burgett* v. *Texas,* 389 U.S. 109 (1967), and *Loper* v. *Beto,* 405 U.S. 473 (1972), petitioner argues that uncounseled convictions lack the degree of reliability necessary to support an enhanced punishment resulting in imprisonment. Brief for petitioner at 14-17. Yet petitioner has never argued that the uncounseled conviction in his case was factually or legally incorrect. Indeed, he conceded its validity before the Illinois Appellate Court. *People* v. *Baldasar, supra* at 461. (A.20) And it is the validity of that conviction which distinguishes this case from *Burgett* or *Loper.* For in those two cases, this Court was dealing with an uncounseled felony conviction which was void under *Gideon* v.

[6] In fact, the trial court could have placed petitioner on probation for the second offense. *Ill. Rev. Stat.,* 1975, ch. 38, § 1005-5-3(d)(1). Additionally, had petitioner been tried without reference to the first conviction he still could have been imprisoned for up to one year. Thus, the difference between an enhanced conviction with counsel and a simple conviction for misdemeanor theft with counsel is the length of imprisonment and not the fact of imprisonment itself.

Wainwright, 372 U.S. 335 (1963). However, since this petitioner's original conviction is valid, there is no reason to question its accuracy or to deny its collateral use as was true in *Burgett* and *Loper*.[7]

Respondents submit that since petitioner's first conviction was valid, it may be used for the collateral purpose of enhancement of sentence upon a second, unrelated conviction. Any other conclusion would completely abrogate this Court's decisions in *Argersinger* and *Scott*.

---

[7] It should be noted that the Illinois Appellate Court, relying on *Burgett* v. *Texas*, *supra*; *Loper* v. *Beto*, *supra*; and *United States* v. *Tucker*, 404 U.S. 443 (1972), has recently reversed and remanded a criminal conviction where the trial judge considered, both for impeachment purposes and for imposing sentence, a prior uncounseled theft conviction *where the defendant had been sentenced to imprisonment* in violation of *Argersinger* v. *Hamlin*, *supra*. *People* v. *Carter*, 72 Ill.App.3d 871, 391 N.E.2d 427 (1st Dist. 1979).

CONCLUSION

For the foregoing reasons, respondents pray that the judgment of the Illinois Appellate Court, Second Judicial District, affirming the conviction and sentence of the petitioner, be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

DONALD B. MACKAY,

MELBOURNE A. NOEL, JR.,

MICHAEL B. WEINSTEIN,
Assistant Attorneys General,
188 W. Randolph St., Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Attorneys for Respondents.

August 27, 1979.

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 77-6219

THOMAS BALDASAR,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

REPLY BRIEF FOR PETITIONER

MARY ROBINSON
Deputy Defender
Office of the State
Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State
Appellate Defender
First Judicial District
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:

RALPH RUEBNER
PETER NOLTE

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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ARGUMENT

THE SIXTH AMENDMENT RIGHT TO COUNSEL FORBIDS THE USE OF A FINE-ONLY UNCOUNSELED MISDEMEANOR CONVICTION TO INCREASE PETITIONER'S IMPRISONMENT ON A SUBSEQUENT OFFENSE UNDER AN ENHANCED PENALTY STATUTE.

A. An Uncounseled Misdemeanor Conviction While Valid For The Purpose Of A Fine Is Not Valid For Enhancing Punishment By Two Years In Prison And Two Years Of Parole

The Respondent has completed a full turnabout from the position it announced in *Scott v. Illinois*, ____ U.S. ____, 59 L.Ed.2d 383 (1979), concerning the issue of whether an uncounseled conviction may be used to enhance a prison sentence on a subsequent offense. In *Scott v. Illinois*, the Respondent declared that a prosecutor would be precluded from using an uncounseled conviction to enhance a subsequent offense:

> With respect to the use of an uncounseled conviction as the basis of a probation revocation proceeding or to enhance a subsequent offense, the use of such convictions to incarcerate an individual depends on how direct the first conviction is to imprisonment. Generally such use has been prohibited. Krantz, et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin*, 35-37, 44 (1976) hereinafter cited as Krantz. This result, however, is not inconsistent with state purposes but is legitimately within the realm of prosecutorial discretion. When prosecuting an offense the prosecution knows that by not requesting that counsel be appointed for defendant, he will be precluded from enhancing subsequent offenses. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion.

Brief of Respondent, at pp. 19-20, *Scott v. Illinois*, 59 L.Ed.2d 383 (1979). Having convinced this Court that counsel is not required where conviction results in a fine only, the Respondent abandons its previous concession to urge the use of uncounseled convictions for enhancement purposes.

The Respondent now argues that since petitioner's 1975 misdemeanor theft conviction was a valid conviction, it was also valid for the purpose of enhancing his subsequent sentence. (Respondent's Brief, pp. 12-13) The Respondent relies on *Griffin v. Blackburn*, 594 F.2d 1144 (5th Cir., 1979), which determined whether petitioner Griffin could be impeached by a prior uncounseled misdemeanor conviction which did not result in imprisonment. Finding that *Scott v. Illinois* had resolved this question, the court concluded that the impeachment was proper because, "[l]ogically, if a conviction is valid for purposes of imposing its own pains and penalties–the 'worst' case–it is valid for all purposes". 594 F.2d at 1046.[1] Such a conclusion overlooks the fact that Scott's counselless conviction was not valid for all purposes, since it authorized only a fine and not a prison sentence. The approach that a conviction valid for one purpose is thus valid for all purposes is also inconsistent with the rule that a defendant may be impeached only by prior convictions which bear directly on testimonial credibility of the witness. (See Fed.R.Evid. 609)

A further analogy can be made concerning the validity of the prior convictions present in *Burgett v.*

[1] The petitioner in *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir., 1979), was proceeding *pro se*. The case was decided on the court's summary calendar without oral argument on May 9, 1979. Apparently, the court was not informed that this Court had previously granted certiorari in this cause on March 19, 1979. The question presented herein may be analagous, but is different since *Griffin v. Blackburn* concerned impeachment with an uncounseled conviction, as opposed to enhancement. Imprisonment in the enhancement situation is a more direct result of the prior uncounseled conviction than in the impeachment context, for the role the impeachment played in the conviction may be speculative. (Pet. Br.19, n.11)

Texas, 389 U.S. 109, 88 S.Ct. 258, 18 L.Ed.2d 319 (1967), and *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). In *Burgett*, the prior uncounseled conviction was held inadmissible for purposes of enhancement, even though the defendant had never sought by collateral remedies to have his prior conviction reversed. In this sense his prior conviction was not void, but voidable or capable of being invalidated upon the defendant's objection to its use. Similarly, in *Loper v. Beto*, 405 U.S. 473 (1972), where the Supreme Court prohibited the use of a prior uncounseled conviction for purposes of impeaching the defendant, there had been no affirmative steps taken to overturn the prior conviction. In both of these cases, then, facially valid convictions existed, but were not valid for subsequent use because they were in violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1961).

Admittedly this is where the analogy falls short in petitioner's case, since his prior misdemeanor conviction is valid for purposes of a fine under *Scott v. Illinois*. However, when the prosecutor seeks to use it for enhancement it suffers from the same defect, lack of counsel, that existed in *Burgett*, *Loper*, and *Gideon*. The type of penalty imposed adds nothing to the degree of reliability of petitioner's prior conviction. What may be acceptable for purposes of imposing a fine is not sufficient to allow the more severe sanction of actual imprisonment. Unless a conviction evinces the necessary degree of reliability, it cannot be used to deprive liberty and be consistent with *Scott v. Illinois* and *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). To demonstrate sufficient

trustworthiness in the fact-finding process to impose enhanced imprisonment, the prosecutor must first show that at the prior trial the person was either represented by counsel or made a knowing and intelligent waiver of counsel. As Justice Stewart wrote for the Court in *United States v. Tucker*, 404 U.S. 443, 447 n.5, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972):

> It is worth pointing out, however, that to make the contrary assumption, i.e., that the prosecution would have turned out exactly the same even if the respondent had had the assistance of counsel, would be to reject the reasoning upon which the *Gideon* decision was based . . .

In sum, then, petitioner's uncounseled misdemeanor conviction while valid for the purpose of a fine, is invalid for the purpose of imposing enhanced imprisonment.

The Respondent's analysis never addresses the question of whether a prior uncounseled conviction evinces the degree of reliability necessary to support the severe deprivation of liberty resulting in an additional two years of incarceration in the penitentiary and two years of parole. Instead, the Respondent first assumes that the validity of the prior misdemeanor is synonymous with its reliability for all purposes. (Resp. Br., 15-16) Second, the Respondent contends that petitioner has never argued that his prior uncounseled conviction was factually or legally incorrect.

Addressing the second argument first, it is simply not correct to say that petitioner has never challenged his prior misdemeanor conviction. Like petitioner Argersinger, we have consistently argued that because Baldasar was not afforded the right to counsel, he was unable to properly raise any defense he may have had

to the prior misdemeanor charge. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The presumption that petitioner's initial misdemeanor conviction is not sufficiently reliable to support enhancement of a subsequent sentence flows from the Sixth Amendment, which "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . .". *Argersinger v. Hamlin*, 407 U.S. 25, 32 n.3 (1972), relying upon *Johnson v. Zerbst*, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Chief Justice Burger agreed with the Court that those misdemeanor defendants unaided by counsel were no more able to defend themselves than those charged with serious crimes. Because of this, he felt that further attacks on such convictions would be fruitless:

> Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record.

Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).[2] These holdings place the burden on the Respondent to show that petitioner was represented by counsel or that he intelligently waived counsel before his prior misdemeanor conviction may be used as

[2] One commentator agrees, concluding that if the defendant is forced to represent himself, the likelihood of review is small, if nonexistent. Furthermore, the author states that success on appeal often comes only as a result of the lawyer's presence at trial; otherwise no adequate record essential to appeal could be made. L. Herman, *The Right To Counsel In Misdemeanor Court*, 25-26 (1973) (hereinafter L. Herman.)

a basis for enhancing a second sentence which actually results in imprisonment.[3]

A valid conviction is not synonymous with its reliability for all purposes. Because uncounseled defendants often do not have the legal skill to defend themselves, there is an unacceptable risk that arises when such convictions are used to enhance the sentences of subsequent convictions. The risk is that a prior conviction of an innocent person may result in a substantial deprivation of liberty.[4] In *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), this Court reversed misdemeanor convictions for loitering and disorderly conduct on the due process ground that the convictions were unsupported by any evidence. Presumably a similar situation could arise and go undetected in a case involving a misdemeanor defendant without counsel who is punished by

[3] No remedy was available for petitioner to attack his May, 1975 uncounseled misdemeanor conviction when he was tried in August, 1976. (App. 20) His time for filing a direct appeal had expired. *Ill. Rev. Stat.*, Ch. 110A, §606(b). His time for filing a post-conviction challenge to the conviction had also expired after six months. *People v. Warr*, 54 Ill. 2d 487, 298 N.E.2d 164 (1963). Since petitioner was not in custody a petition for a writ of habeas corpus in federal court could not be filed. 28 U.S.C. §2254.

[4] L. Herman, *supra*, at 27 claims that every student of the misdemeanor process has observed that the risk of convicting an innocent person in misdemeanor court is much higher than in felony court, citing as examples statement of Prof. D. H. Oaks, in *Mass Production Justice And The Constitutional Ideal*, 97-98 (Whitebread ed. 1970); W. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 Legal Aid Brief Case 151, 152 (1970).

only a fine.[5] Under the Respondent's theory such a conviction could be used to enhance a subsequent sentence, as could a conviction upon which a fine was imposed, even though the circumstances described by Justice Stewart in his dissent from the denial of certiorari in *Winters v. Beck*, 385 U.S. 907, 907-908, 87 S.Ct. 207, 17 L.Ed.2d 137 (1966), were present:

> . . . The judge did not advise him of the nature of the charges against him, of the possible penalty, or of his right to make objections, cross-examine witnesses, present witnesses in his own behalf, or to have a trial *de novo* in the county circuit court under Ark.Stat.Ann. §§44-115, 44-509 (1964 Repl.Vol.) Not surprisingly, the petitioner did not object to the evidence offered by the prosecution, did not cross-examine the prosecution witnesses, did not exercise his right to a trial *de novo* in the county circuit court. Also not surprisingly, the petitioner did not question the vagueness of the charge against him [immorality] nor the validity

[5] It would probably occur more frequently that a defendant would be convicted where the evidence would be insufficient to meet the constitutional standard of proof beyond a reasonable doubt as opposed to situations where the conviction did not meet the no evidence standard of *Thompson v. Louisville. Cf. Jackson v. Virginia*, ____ U.S. ____, 61 L. Ed. 2d 560 (1979). The appellate branch of the Legal Aid Society of New York wins approximately 40 percent of its appeals from misdemeanor convictions. In 16 percent of its appeals convictions were reversed on the ground of insufficient evidence. Brief for the Legal Aid Society of New York as Amicus Curiae, pp. 17-18, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

> of converting a sentence of 30 days into one of 9½ months solely because of his poverty.[6]

What this Court must decide is whether misdemeanors that are indistinguishable from those described above (except for the fact that liberty was not deprived) may be used as a basis to enhance a subsequent sentence that results in incarceration. When a defendant is tried without counsel he is placed in a position of prejudice. This Court in *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972), referred to one study that concluded that misdemeanants represented by counsel are five times as

[6] A public defender from Philadelphia has observed what may happen when a court advises a *pro se* defendant his right to cross-examination:

> I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of the prosecuting witness. Not infrequently, this violation of the rules of trial procedure brings forth a sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.

Pollock, *Equal Justice in Practice*, 45 Minn. L. Rev. 737, 741-742 (1961).

likely to emerge from court with all charges dismissed as those who face similar charges without counsel.[7]

B. Prohibiting Enhancement Of Imprisonment On The Basis Of Uncounseled Misdemeanor Convictions Will Not Cause Confusion In Administering The Criminal Justice System Nor Result In Substantial Costs To The States

The respondent ignores the risks inherent in uncounseled convictions and instead argues that the preclusion of using an uncounseled conviction for enhancement will result in substantial costs and confusion and undercut the holdings of *Scott* and *Argersinger.* (Resp.

[7] Other studies have reached similar results:

> In March, 1965, 1,590 persons were arraigned in New York City's misdemeanor court on disorderly conduct charges. 1,259 pleaded guilty, 325 were acquitted, and six were convicted after trial. In March, 1966, after Legal Aid representation was introduced into the court, 1,326 were arraigned, 45 pleaded guilty, one was convicted after trial, and 1,280 were acquitted.

Botein, N.Y. Governor's Conference on Crime 149 (1966), quoted in P. Wald, *Poverty and Criminal Justice,* Appendix C to The President's Commission On Law Enforcement and Administration Of Justice, Task Force Report: The Courts 141, n. 16 and L. Herman *supra* p. 27. *See, too,* Herman's own study of the Columbus, Ohio Municipal Court, where in a month dismissals occurred in 63 percent of the cases where the defendants had counsel as opposed to 17 percent where they were not represented.

Br., 10, 14)[8] The Respondent's concession referred to at pages one and two of this brief, which was made in *Scott v. Illinois,* is a recognition that petitioner Baldasar is not asking this Court to in effect overrule *Scott.* Petitioner is not asking this Court to hold that a defendant be represented in *all* misdemeanor prosecutions. Nor is it suggested that this Court require the appointment of counsel in *any* misdemeanor trial where imprisonment is not imposed as a punishment. Instead the petitioner seeks a rule that would preclude the prosecution from elevating misdemeanors to felonies and from enhancing sentences upon fine-only uncounseled misdemeanor convictions. Therefore, any state still has the option of not providing counsel when faced with a theft prosecution such as petitioner's first misdemeanor charge, which involved the theft of three packages of bacon.

[8] The Amicus makes an identical argument claiming that the decision in this case will directly affect felony prosecutions for repeat offenders under 8 U.S.C. §1325. (Amicus Br., 2, 5-8) The Amicus states that there are more than 13,000 petty offense cases disposed of under this section a year. That figure is misleading because it does not indicate how many of these prosecutions involved repeat offenders. Nor does the figure indicate how many of the 13,000 defendants had counsel, waived counsel, or were indigent. Moreover the claim that 500 prosecutions concerning subsequent illegal entries by aliens involve many cases where the defendants were not represented by counsel at the time of their first conviction is also misleading since the Amicus cannot say how many cases this involves. The matters are outside the record and are provided by an unnamed, unpublished INS source. The estimate of 500 felony prosecutions each year under §1325 is incorrect. The United States District Court Sentences Imposed Chart for the 12 month period ending June 30, 1978, and published by the Administrative Office of the United States Courts page seven indicates that 198 defendants were sentenced for a felony offense §1325 in district court.

The cost to the Respondent, if any, arises in the event that the prosecution requests that counsel be appointed in order to preserve its option to enhance petitioner's sentence at a later date. However, the majority of misdemeanor offenses are not tied to any enhancement provision. Thus, the problem in the instant case is minute in scope compared with that posed by *Scott v. Illinois*, where, had petitioner prevailed, counsel would be provided in every misdemeanor where imprisonment was an authorized punishment. In many enhancement situations the Respondent may already provide counsel, since serious offenses may be at issue and the prosecution is seeking imprisonment upon the first violation of the particular misdemeanor offense. The Respondent's and the Amicus' assertion that the implementation of the requested rule would result in substantial cost is not supported by any data, nor is the cost estimated. Petitioner asks this Court to reject the arguments in part because they are factually incorrect, but "in much larger part because of the Court's conclusion that incarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." *Scott v. Illinois*, 59 L.Ed.2d 383, 388-389 (1979).[9]

[9]The "substantial cost" argument was accepted by the majority panel in *Scott v. Illinois*, 59 L.Ed.2d at 389. However, the minority of the Court rejected this argument as irrelevant and speculative. 59 L.Ed.2d at 396 (Brennan, J., concurring). *See too* L. Herman and Thompson, *Scott v. Illinois*, and the Right to Counsel: A Decision in Search of a Doctrine? 17 Am. Crim. L. Rev. 71 (1979). In view of the fact that imprisonment is at issue here the argument concerning cost may be found to be irrelevant.

That confusion and expense will not arise from the rule petitioner urges is demonstrated partially from the majority of jurisdictions that have adopted the rule. (Pet. Br., 18-24) In those states prosecutors and trial courts know that, absent a knowing and intelligent waiver, no enhancement will be allowed from an uncounseled misdemeanor. If neither the history of the defendant, nor the seriousness of the charge indicates that jail is a likely sentence, it is also unlikely that the need for enhancement will arise. Conversely, if a pattern of criminal conduct appears to be developing, certainly the prosecutor could ask that counsel be appointed, and keep the option of enhancement at a later date open. This solution was so obvious that the Respondent previously admitted in *Scott v. Illinois* that it would be precluded from enhancement of subsequent offenses if it did not initially provide counsel for the defendant. It found this acceptable as falling within the proper scope of prosecutorial discretion. (Brief of Resp. 19-20, *Scott v. Illinois*, 59 L.Ed.2d 282 (1979).[10]

The Respondent and the Amicus find it significant that petitioner's sentence was for his second conviction and not an additional or delayed punishment for the original offense. (Resp. Br., 15) (Amicus Br. 9) However, it cannot be denied that the judgment and conviction obtained in the first trial was a necessary element of proof to justify subsequent imprisonment.

[10]One reason this decision rests more with the prosecutor than with the trial court is that "[i]n a nonjury case the prior record of the accused should not be made known to the trier of fact except by the way of traditional impeachment." *Argersinger v. Hamlin*, 407 U.S. 25, 42 (1972) (C. J. Burger, concurring).

People v. Ramey, 22 Ill.App.3d 916, 317 N.E.2d 143 (2nd Dist., 1974). Without the conviction petitioner could not have had his maximum sentence increased by two years, nor an automatic two-year parole term added, nor a misdemeanor elevated to a felony so that the place of incarceration would be in a penitentiary. The Respondent and Amicus argue that the heavier punishment was for the second offense, but this begs the question of whether the first conviction is reliable enough to warrant an additional two years' deprivation of liberty for a second offense. The consequence in petitioner's situation, whether referred to as a direct result or a collateral consequence, should not be allowed unless the petitioner was represented by or waived counsel at his original trial.

The Amicus presumes that if petitioner prevailed this Court's decision would be retroactive, thus having a confusing and costly effect which would include an extensive upsetting of final judgments through collateral attack. (Amicus Br. 8) In presuming retroactivity, the Amicus implicity admits that this case falls within the category succinctly explained by Mr. Justice White, speaking for a plurality of the Court:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given retroactive effect . . . Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971). Since the absence of counsel at petitioner's first trial was directly connected with the truth-determining process, the cost and confusion argument made by the government should be given little weight. Of course, the question of retroactivity posed by the Amicus is simply not before the Court in this case.[11]

C. Contrary To The Amicus' Suggestion, This Is Not A Case Concerning A Status-Type Offense, Nor Has A Double Jeopardy Argument Or Substantive Due Process Argument Been Made By The Petitioner

There is no dispute that petitioner's enhanced sentence was for his second conviction. Contrary to the Amicus' assertion, petitioner has never argued that this is a Double Jeopardy case. (Amicus Br. 9) What the Amicus ignores is that it is impossible to deny that "but for" the earlier conviction, the petitioner would not have had his liberty deprived for an additional two

[11] In this section the Amicus misstates the petitioner's position in footnote 9 of its brief at page 8. Petitioner does not reject the dissent below which was of the opinion that imprisonment directly results from the enhanced punishment situation and that the connection is more remote for impeachment. (App. A-29) (Pet. Br. 19-20, n. 11) What petitioner argued was that if this Court reaches the question of impeachment the better result would be to preclude impeachment by a prior uncounseled conviction even if the actual deprivation of liberty is not as direct a consequence as the instant situation.

years. Such a use of an uncounseled misdemeanor conviction makes the accused suffer "anew" from the fact that counsel was not present. *Burgett v. Texas*, 389 U.S. 109, 115 (1967).

The Amicus relies on *Mays v. Harris*, 523 F.2d 1258 (4th Cir., 1975), in arguing that enhanced punishment statutes are properly analyzed as defining status offenses. (Amicus Br. 10) *Mays v. Harris* is not persuasive authority for this proposition and may have been decided improperly. Mays had been convicted of operating a motor vehicle while classified as a habitual offender. The district court granted Mays' habeas corpus petition because it found that two of the four convictions underlying Mays' habitual offender status were invalid under *Argersinger v. Hamlin*, 407 U.S. 25 (1972), since Mays had been imprisoned without counsel. *Mays v. Harris*, 369 F.Supp. 1348 (W.D.Va. 1973). The Fourth Circuit reversed, finding that the sentence Mays complained about did not depend upon the validity of his underlying convictions:

> Mays was convicted and sentenced, therefore, not because he was an adjudged habitual offender, but because he wilfully and flagrantly violated an extant court order [not to operate a motor vehicle].

Mays v. Harris, 523 F.2d 1258, 1259 (4th Cir., 1975). In an analogy to contempt proceedings the court found that Mays' present conviction did not flow directly from the earlier adjudication, since an essential new element was that Mays drove a motor vehicle in the face of an order forbidding it. No similar order appears in the instant case, nor does the Illinois theft statute that petitioner Baldasar was initially convicted of confer a status upon him. (*Ill.Rev.Stat.*, 1975, Ch. 38, §1005-8-3(a)(1) Pet. Br. 3). Thus, the contempt analogy must fail and the conclusion remains that the enhanced penalty flows directly from the prior misdemeanor conviction.

Besides being distinguishable, the holding of *Mays v. Harris* may be incorrect since the option gives no indication that it ever considered the implications of *Burgett v. Texas*, 389 U.S. 109 (1967). It would seem inescapable that in part, the prior uncounseled offenses of Mays supported the determination of guilt for his later offense in violation of *Burgett*. For this approach see *City of Monroe v. Fincher*, 305 So.2d 108, 110 (La., 1974) explained at page 18 of petitioner's brief.

Next, the Amicus refers to the fact that 18 U.S.C. App. 1202(a)(3) prohibits the possession of a firearm by any person who has been adjudged a mental incompetent. It argues that it is proper to base the conviction on the prior civil commitment proceedings even though the standard of proof is lower than that in a criminal trial. While that statement is correct, the Amicus fails to note that the subject of an involuntary commitment would be constitutionally entitled to counsel. *Heryford v. Parker*, 396 F.2d 393 (10th Cir., 1968). Therefore the truth-finding process would not be affected to the degree it would where counsel is absent. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Trials*, 70 Harv.L.Rev. 1, 8 (1956).

The Amicus' argument that the original misdemeanor conviction is at least as reliable in showing petitioner's need for enhanced punishment as is information routinely considered in pre-sentence reports is highly

questionable in view of *United States v. Tucker*, 404 U.S. 443 (1972). The Amicus fails to state why an uncounseled misdemeanor conviction is any different from an uncounseled felony conviction other than to cite the misdemeanor's validity for purpose of a fine only. The sentencing analogy also fails because the prior misdemeanor is an essential element of the subsequent offense, and upon proof beyond a reasonable doubt of that element an entirely different and more severe range of sentencing options come into existence. For example, without the prior misdemeanor conviction petitioner could have at the worst been sentenced to less than one year, but upon proof of the prior conviction under the enhancement provision, the maximum sentence could be three years, which petitioner received. (Compare *Ill.Rev.Stat.*, 1975, Ch. 38, §1005-8-3(a)(1) with §1005-8-1(b)(5) and (c)(5).) The trial court could have placed petitioner on probation for the second, enhanced offense; however, if it chose to imprison petitioner, it could not do so for less than a one-year period. *Ill.Rev.Stat.*, 1975, Ch. 38, §1005-5-3(d)(1). No similar consequence could flow from a court's reliance upon such material at a subsequent sentencing hearing where enhancement was unavailable. While the Amicus suggests that severe consequences do not alone require the appointment of counsel, the Sixth Amendment prohibits such a severe loss of liberty as this without the right to counsel.

The Amicus incorrectly frames the question in this case as being whether the legislative decision to treat those previously convicted of a misdemeanor more stringently than first offenders is arbitrary when the defendant was not represented by counsel at the first

trial. (Amicus Br. 10) The petitioner has never made such a substantive due process argument that the legislature's enhancement scheme was arbitrary. Petitioner does not question the essence of the enhancement statute as being contrary to substantive due process. Rather, if this case is viewed in terms of a due process question, it should be viewed as a question of procedural due process rather than substantive due process as the Amicus would have it. This is, the petitioner's procedural due process rights under the Sixth and Fourteenth Amendments were violated by the manner in which his case fell within the enhancement statute. Even if the statute is sound in its end, the procedures leading to its application must conform to due process protections. Here they did not. Petitioner's procedural due process rights were violated when a previous uncounseled misdemeanor conviction was used to place him within the purview of the statute. His due process rights were violated in that additional imprisonment was imposed under the statute as a direct result of an uncounseled misdemeanor conviction. Petitioner's claims may succeed where petitioner Scott's failed since the consequence in *Scott v. Illinois* was a fine, whereas here the consequence is actual imprisonment in violation of *Argersinger v. Hamlin*.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

MARY ROBINSON
Deputy Defender
Office of the State
Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State
Appellate Defender
First Judicial District
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:

RALPH REUBNER
Deputy Defender
Office of the State Appellate Defender
130 North Wells Street
Suite 2200
Chicago, Illinois 60606

PETER B. NOLTE
Suite 503
Rock River Savings Building
Rockford, Illinois 61101

Supreme Court, U. S.
FILED
AUG 16 1979
MICHAEL RODAK, JR., CLERK

No. 77-6219

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS BALDASAR, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WADE LIVINGSTON
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6219

THOMAS BALDASAR, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a misdemeanor conviction, valid under *Scott* v. *Illinois*, No. 77-1177 (March 5, 1979), may serve as the basis for an enhanced punishment for a subsequent offense.

INTEREST OF THE UNITED STATES

In federal district courts, an indigent defendant need not be offered appointed counsel when he is tried for a petty offense,[1] so long as he is not sentenced to

[1] A petty offense is a misdemeanor punishable by imprisonment for not more than six months or by a fine not exceeding $500, or both. 18 U.S.C. 1(3).

imprisonment on conviction (18 U.S.C. 3006A(a)); *Scott* v. *Illinois*, No. 77-1177 (March 5, 1979). Many federal statutes provide that a first offense is punishable as a petty offense, but that subsequent convictions are punishable by increased terms of imprisonment.[2] The most significant of these statutes is 8 U.S.C. 1325, which prohibits illegal entry into the United States by an alien. A second violation of Section 1325 is considered a felony and is punishable by imprisonment for not more than two years or a fine of not more than $5,000, or both. More than 13,000 petty offense cases are disposed of annually under this Section. *1977 Annual Report of the Director of the Administrative Office of the United States Courts* 175. These cases typically involve indigent aliens, unrepresented by counsel. The Immigration and Naturalization Service estimates that each year more than 500 prosecutions under Section 1325 involve subsequent illegal entries and are therefore treated as felony prosecutions. Although indigent defendants in such cases are provided with counsel, in many cases the defendants were unrepresented at the time of their first conviction. The felony prosecutions for repeat offenders under Section 1325 thus will be directly affected by the decision here.[3] In addition,

[2] *E.g.*, 15 U.S.C. 1263 (shipment of misbranded or banned hazardous substances); 25 U.S.C. 202 (inducing an Indian to purport to convey title held by the United States in trust for him).

[3] INS also informs us that the possibility of an enhanced sentence is a significant factor in plea bargaining.

the criminal justice system of the District of Columbia will be affected in much the same way as any other local system (see, *e.g.*, Pet. App. A-3 n.1).[4]

STATEMENT

Under Illinois law, petty theft is a misdemeanor, punishable by a term of less than one year's imprisonment. Ill. Rev. Stat. ch. 38, ¶ 16-1(e)(1) (1974). A second or subsequent conviction, however, is treated as a felony and is punishable by a term of between one and three years. Ill. Rev. Stat. ch. 38, § 1005-8-1(b)(5).

On November 13, 1975, petitioner was convicted of stealing a shower massage from a Montgomery Ward store. Because he had previously been convicted of petty theft,[5] petitioner was sentenced under the felony provision applicable to second and subsequent petty theft offenses. He was sentenced to a term of one to three years' imprisonment (A. 17). Petitioner was represented by counsel at the trial for his second offense, but not at the trial for his 1975 petty theft offense (A. 20).

On appeal, petitioner argued that because he had not been represented by counsel at his first trial, he should not have been subject to the enhanced penalty for his second offense. The Illinois Appellate Court

[4] Moreover, the enforcement in federal courts of state law under the Assimilative Crimes Statute, 18 U.S.C. 13, will be affected.

[5] Petitioner was sentenced to one year's probation after his first conviction.

rejected this contention and affirmed his conviction and sentence. As the court noted, petitioner conceded that his 1975 conviction was valid, since he had not been imprisoned for that offense (A. 20). The court rejected petitioner's contention that the use of a prior uncounseled theft conviction to enhance the punishment for his second conviction in effect resulted in his imprisonment for the first offense. The court held that petitioner "was sentenced to imprisonment for his second theft conviction only and not, as he suggests, sentenced again, and this time to imprisonment, for the first theft conviction" (A. 24). Petitioner then sought leave to appeal to the Illinois Supreme Court, which was denied (A. 31). This Court granted certiorari on March 19, 1979 (A. 32).

ARGUMENT

1. In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), this Court held that a state may not constitutionally imprison an indigent defendant for a petty offense unless he has been offered appointed counsel at his trial. *Scott* v. *Illinois*, No. 77-1177 (March 5, 1979), refused to extend the holding in *Argersinger* to require an offer of counsel in all cases in which imprisonment is statutorily authorized. The Court explained (slip op. 6 (footnote omitted)):

> Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

The same reasoning requires rejection of petitioner's claim that *Argersinger* should be extended to bar the consideration of counsel-less misdemeanor convictions in determining whether a defendant is a repeat offender.[6] Here, as in *Scott*, the extension would create confusion and impose substantial costs on state and federal criminal justice systems.[7]

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[6] Petitioner contends (Br. 18-24) that most courts that have considered the issue have adopted the approach he urges. But all of the opinions on which he relies were decided before *Scott*. As the Fifth Circuit recognized in *Griffin* v. *Blackburn*, 594 F.2d 1044 (1979), this Court's decision in *Scott* resolved the previous conflict of authority concerning the collateral effects of uncounseled misdemeanor convictions. "The Court's opinion [in Scott] is short, broad, and grounded in basic principles. It displays no disposition to distinguish between possible effects, uses or consequences of such convictions. The authorities it cites as being in conflict are quite disparate, factually. Logically, if a conviction is valid for purposes of imposing its own pains and penalties—the 'worst' case—it is valid for all purposes" (594 F.2d at 1046).

[7] The extent of the potential burden on the various states is suggested by the number of states with statutes providing, either generally or for specific offenses, that repeated serious traffic violations are punishable by an increased term of imprisonment.

General:

Alabama—Ala. Code tit. 32, § 5-311 (1977);
Arkansas—Ark. Stat. Ann. § 75-1004 (1957);
Delaware—Del. Code Ann. tit. 21, § 4205 (1975);

As the Chief Justice emphasized in his concurrence in *Argersinger* (407 U.S. at 42), that decision placed "a new load on courts already overburdened," since it

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Kansas—Kan. Stat. Ann. § 8-5,125 (1964);
Louisiana—La. Rev. Stat. § 32:57 (West Cum. Supp. 1979);
Mississippi—Miss. Code Ann. § 63-9-11 (1973);
New York—N.Y. Veh. & Traf. Law §§ 1800, 1801 (McKinney 1970);
Ohio—Ohio Rev. Code Ann. § 4511.99 (Page Supp. 1978);
West Virginia—W. Va. Code § 17C-18-1 (1974);
Wyoming—Wyo. Stat. Ann. § 31-5-1201 (1977).

Specific offenses:

Arizona—Ariz. Rev. Stat. § 28-692.01 (Cum. Supp. 1978) (driving while intoxicated—"DWI");
Arkansas—Ark. Stat. Ann. §§ 75-601.8, 75-1026.2 (Cum. Supp. 1977) (speeding near a school and DWI);
California—Cal. Veh. Code § 42001 (West Cum. Supp. 1979) (failure to submit to safety inspection or flight from a peace officer);
District of Columbia—D.C. Code §§ 40-605, 40-609 (1973) (reckless driving, leaving the scene of an accident, and DWI);
Idaho—Idaho Code § 49-1102 (Cum. Supp. 1978) (DWI);
Kentucky—Ky. Rev. Stat. § 189.990(9), (19) (Supp. 1978) (DWI and fleeing from an officer);
Louisiana—La. Rev. Stat. Ann. § 14:98 (West Cum. Supp. 1978) (DWI);
Maryland—Md. Transp. Code Ann. § 27-101(i) (Cum. Supp. 1978) (driving with a revoked, suspended or cancelled license, DWI, and fleeing from an officer);
Michigan—Mich. Stat. Ann. § 9.2325 (Cum. Supp. 1979) (DWI);
Missouri—Mo. Ann. Stat. § 564.440 (Vernon Supp. 1979) (DWI);
Montana—Mont. Rev. Codes Ann. §§ 32-2142, 32-2143 (1961) (DWI and reckless driving);
Nebraska—Neb. Rev. Stat. § 39-669.07 (1974) (DWI);

required a prediction before trial of whether imprisonment would be an appropriate sentence on conviction. But that prediction, the Chief Justice concluded, "is not beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer" (*ibid.*). In contrast, it is likely to be impossible to predict with any hope of accuracy what the collateral consequences of a conviction will be to any particular defendant at any time in the future. Therefore, acceptance of petitioner's contention would mean that, to avoid foreclosing the use of the conviction in the future, a cautious judge would have to offer counsel whenever imprisonment was a possible collateral consequence of the conviction. That is, in effect, precisely the result rejected in *Scott*.

Nevada—Nev. Rev. Stat. § 484.379 (1977) (DWI);
New Jersey—N.J. Stat. Ann. § 39.4-50 (West Cum. Supp. (1979) (DWI);
New Mexico—N.M. Stat. Ann. §§ 66-8-102, 66-8-113 (1978) (DWI and reckless driving);
New York—N.Y. Veh. & Traf. Law § 1180(f) (McKinney Cum. Supp. 1979) (speeding);
North Carolina—N.C. Gen. Stat. § 20-179 (1978) (DWI);
North Dakota—N.D. Cent. Code § 39-08-01 (Supp. 1977) (DWI);
Pennsylvania—75 Pa. Cons. Stat. Ann. § 6503 (Purdon 1977) (driving without a license or while license is suspended or revoked, racing on a highway, fleeing an officer, driving without lights, making a false accident report);
South Carolina—S.C. Code § 56-5-2940 (1977) (DWI);
Virginia—Va. Code § 46.1-15.2 (Cum. Supp. 1978) (tampering with an odometer);
West Virginia—W. Va. Code § 17C-5-2 (Cum. Supp. 1978) (DWI).

Moreover, the confusing and costly effect here presumably would include extensive upsetting of final judgments through collateral attack, since *Argersinger* applies retroactively. *Berry* v. *Cincinnati*, 414 U.S. 29 (1973). See *Marston v. Oliver*, 485 F.2d 705 (4th Cir. 1973), cert. denied, 417 U.S. 936 (1974). Not only persons like petitioner who have been sentenced to enhanced penalties for subsequent offenses, but also persons whose parole or probation has been revoked because of counsel-less misdemeanor convictions,[8] and perhaps even those who have been convicted after trials in which their credibility was impeached by such convictions (see Fed. R. Evid. 609 (a)(2)), could claim that they have been imprisoned as a collateral consequence of their original counsel-less convictions.[9]

2. Petitioner's claim that *Argersinger* bars his sentence under the enhanced penalty provision is

[8] Even if the counsel-less conviction could not itself be used in revocation proceedings, surely the conduct on which the conviction was based could be considered (*State* v. *Harris*, 312 So. 2d 643 (La. 1975)). But when *Argersinger* is applied retroactively, the facts may be so stale that this is no longer a practical alternative.

[9] The dissent below suggests (Pet. App. A-6) that although imprisonment is "a direct result" of the uncounseled conviction in the enhanced punishment situation—and presumably in parole or probation revocation—the connection is more remote when the conviction is used for impeachment or in sentencing. Petitioner rejects this distinction (Br. 19-20 n. 11), although he correctly notes that those questions are not before this Court. We mention them only to emphasize the further confusion that would flow from acceptance of petitioner's contention.

premised on the contention that his sentence of imprisonment is based on his original uncounseled conviction (Br. 13). But the sentence of imprisonment is for his second conviction; it is not a delayed punishment for the original offense. If it were, it would be prohibited not simply by *Argersinger*, but by the Double Jeopardy Clause of the Constitution.

This Court has repeatedly rejected the claim that an enhanced penalty for a subsequent offense constitutes an additional punishment for the original offense. Here, as in *McDonald* v. *Massachusetts*, 180 U.S. 311, 312 (1901), "[t]he fundamental mistake of the [petitioner] is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished * * *. But it does no such thing. * * * The punishment is for the new crime only, but is the heavier if he is an habitual criminal." The heavier punishment for a second similar offense is justified because the repetition of the offense demonstrates that "the former punishment has been inefficacious in doing the work of reform for which it was designed." *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895); accord, *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912); *Carlesi* v. *New York*, 233 U.S. 51, 57 (1914). Cf. *Pennsylvania* v. *Ashe*, 302 U.S. 51, 54-55 (1937).

The enhanced punishment statutes are properly analyzed as defining status offenses. The repeat offender is treated more severely because of his status —the collateral effect of the first offense is to place him in the category of those who, if they again vio-

late the statute, are subjected to a more severe sanction. *Mays* v. *Harris*, 523 F.2d 1258 (4th Cir. 1975). That collateral effect is similar to those noted by Mr. Justice Powell, concurring in *Argersinger* (407 U.S. at 48),[10] which the Court found insufficient to require the appointment of counsel.

Under this analysis, the question posed by this case is whether the legislative decision to treat those previously convicted of a misdemeanor more stringently than first offenders is arbitrary when the defendant was not represented by counsel at the first trial. The legislative classification is arbitrary only if the original conviction is insufficiently reliable to justify the classification.[11] But a conviction that is reliable

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[10] See also Brennan, J., dissenting in *Scott, supra*, slip op. 7-8.

[11] Petitioner claims that the decisions in *Argersinger* and *Scott* turned on the conclusion that counsel-less convictions lack the reliability necessary to justify a deprivation of liberty, and that "the absence of imprisonment on petitioner's first theft conviction adds nothing to its reliability" (Br. 17). But as *Scott* makes clear (slip op. 6), "the central premise" of *Argersinger* was not the unreliability of counsel-less decisions, but the difference to the defendant between a fine or a threat of imprisonment on the one hand, and actual imprisonment on the other. Thus, in terms of the due process analysis outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), it was the weight of the first factor—"the private interest that will be affected by the official action"—rather than the second—"the risk of erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional * * * safeguards"—that led to the result in *Argersinger*. See also *Parham* v. *J.L.*, No. 75-1690 (June 20, 1979), slip op. 13-27. Indeed, a different weighting of these two factors underlies Mr. Justice Powell's disagreement with the analysis of the majority in *Argersinger*. It was precisely

enough to support the imposition of punishment short of imprisonment is surely also reliable enough to establish the status of a first offender.[12] Indeed, the original misdemeanor conviction is at least as reliable in showing petitioner's need for enhanced punishment as is much of the information routinely considered in presentencing reports, or the indicators of status used in similar federal statutes.

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because he found the error-reducing factor of primary importance that Mr. Justice Powell concluded that due process requires a case-by-case evaluation of the complexity of the issues involved to determine whether appointed counsel must be provided (407 U.S. at 49-52). Cf. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786-791 (1973). In contrast, the majority focused not on the effect of counsel on the reliability of the result in a given case, but on the impact of imprisonment on the defendant, and consequently relied on that factor in defining the cases in which counsel is constitutionally required. *Scott, supra*, slip op. 6. See Note, *Argersinger* v. *Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 Ohio St. L.J. 168, 173-176 (1974) (*Argersinger* cannot satisfactorily be explained as based on unreliability of uncounseled convictions).

[12] It might be argued that a conviction *invalid* under *Argersinger*, because it resulted in confinement, could not be used to establish first offender status consistently with *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, 404 U.S. 443 (1972); and *Loper* v. *Beto*, 405 U.S. 473 (1972). We do not believe that those cases preclude the mere recognition of an uncounseled conviction as an historical fact, or the imposition of collateral consequences on the basis of that conviction—at least in the absence of a successful challenge to it. Cf. *Lewis* v. *United States*, cert. granted, No. 78-1595 (June 18, 1979). In any event, since petitioner's original conviction was *valid*, there is no prophylactic reason to deny it effect, as there was in the *Burgett* line of cases. Cf. *Spencer* v. *Texas*, 385 U.S. 554 (1967).

For example, 18 U.S.C. App. 1202(a)(3) prohibits the possession of a firearm by any person who has been adjudged a mental incompetent. But the constitutionally acceptable risk of error in the civil commitment proceeding upon which that judgment is based is substantially higher than the acceptable risk in a criminal proceeding of any kind. *Addington* v. *Texas*, No. 77-5992 (April 30, 1979), slip op. 4-13.[13]

In short, the fact that there may be severe collateral consequences of a proceeding does not alone require that appointed counsel be provided. *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976). Nor is it unreasonable for the legislature to conclude that those previously convicted of a misdemeanor should be more severely punished on a subsequent conviction, even if the original conviction resulted from a proceeding in which the defendant was not represented by counsel. Indeed, any other result would undermine the practical effectiveness of this Court's decision in *Scott*.

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[13] Similarly, an alien who has been deported after a deportation hearing, at which he is not entitled to appointed counsel (8 U.S.C. 1252(b)(2); *Murgia-Melendrez* v. *INS*, 407 F. 2d 207, 208-209 (9th Cir. 1969)), is guilty of a felony if he illegally reenters the United States. 8 U.S.C. 1326.

A driver's license may be suspended after an administrative hearing (*Bell* v. *Burson*, 402 U.S. 535, 542-543 (1971)), and driving after one's license has been suspended may be punishable as a felony. *Mays* v. *Harris*, 523 F. 2d 1258 (4th Cir. 1975).

CONCLUSION

The judgment of the Illinois Appellate Court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WADE LIVINGSTON
Attorney

AUGUST 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 299048 54